82-766

No.

Office - Supreme Court, U.S.
FILED
NOV 8 1982
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF STATE OF MARYLAND,
Petitioner,

v.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. Is a percentage limitation only on the fundraising costs of charities facially unconstitutional *per se* under the First Amendment no matter how moderate, flexible or reasonably applied?

2. Does State law imposing a criminal penalty or authorizing withdrawal of registration from a charity spending more than 25% on fundraising costs constitute a "prior restraint" on that charity when compliance with percentage limitation is not a condition precedent for registration and a charity may be exempted from the percentage limitation requirement, even after that limitation has been exceeded?

3. May a professional fundraiser to whom a percentage limitation on fundraising fees may be validly applied challenge that limitation on its face with respect to others in the absence of prior restraint or a showing of real and substantial First Amendment overbreadth?

PARTIES

The parties to the proceedings in the Court of Appeals of Maryland were the Joseph H. Munson Company, Inc. and the Secretary of State of Marvland, at that time Fred L. Wineland. Mr. Wineland resigned on July 1, 1982 and was subsequently replaced by Patricia G. Holtz.

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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

The Secretary of State of Maryland, Patricia G. Holtz, prays that a writ of certiorari issue to review the judgment entered in this case on August 5, 1982 by the Court of Appeals of Maryland.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported as Joseph H. Munson Co., Inc. v. Secretary of State, ___ Md. ___, 448

A.2d 935 (1982) and is reprinted in the appendix to this petition (App. 1a). The opinion and judgment of the Court of Special Appeals of Maryland reversed by the State's highest court is reported as Joseph H. Munson Co., Inc. v. Secretary of State, 48 Md.App. 273, 426 A.2d 985 (1981), and is also reprinted in the appendix (App. 23a). The opinion and order of the Circuit Court for Anne Arundel County that occasioned an appeal is unreported, but is reprinted in the appendix (App. 38a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 5, 1982. The jurisdiction of this Court rests on 28 U.S.C. §1257(3) and 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State small make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Annotated Code of Maryland

Article 41, §103D:

(a) A charitable organization other than a charitable salvage organization may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity. The Secretary of State shall, by rule or regulation in accordance with the "standard of accounting and fiscal reporting for voluntary health and welfare organizations" provide for the reporting of actual cost, and of allocation of expenses, of a charitable organization into those which are in connection with a fund-raising activity and those which are not. The Secretrary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the

charitable organization from raising contributions.

The 25% limitation in this subsection shall not apply to compensation or expenses paid by a charitable organization to a professional fund-raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund-raising activity, such compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund-raising activity.

(b) For purposes of this section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drink sold or provided to the public, nor should these costs be included as fund-raising costs; (2) the actual postage paid to the United States Postal Service and printing expenses in connection with the soliciting of contributions, nor should these costs be included as fund-raising costs.

(c) Every contract or agreement between a professional fund-raiser counsel or a professional solicitor and a charitable organization shall be in writing, and a copy of it shall be filed with the Secretary of State within ten days after it is entered into and prior to any solicitations.

Code of Maryland Regulations

COMAR 01.02.04.05:

A. Calculating Fund-raising Expenses. If an organization confines its solicitation to one or more clearly delineated campaign periods, the 25-percent limitation contained in Article 41, §103D(a), Annotated Code of Maryland, may be applied retrospectively on an annual basis or on a campaign-by-campaign basis. Under no circumstances, however, may an organization enter into an agreement to pay as expenses in connection with a fund-raising activity a total amount in excess of 25-percent of the total gross income raised or received by reason of the fund-raising activity, except as set forth in Article 41, §103D(a) and (b), Annotated Code of Maryland, and this regulation.

B. Exceeding the 25-percent Limitation.

(1) The Secretary may permit an organization to exceed the 25-percent limitation contained in Article 41, §103D(a), Annotated Code of Maryland, upon a showing that it is necessary to the accomplishment of the organization's charitable purpose and that there is no other reasonable alternative.

(2) Instances in which the 25-percent limitation would effectively prevent an organization from raising contributions, include, but are not limited to, the following situations:

(a) When there are extraordinary, unusual, and non-recurring circumstances which

can be factually supported; and

(b) When an organization is less than 2 fiscal years old and in the developmental state.

(3) An organization which expects to exceed or does exceed the 25-percent limitation shall file a request for a waiver with the Secretary on forms provided by him before further engaging in solicitation. The organization shall provide the Secretary with the percentage amount by which it expects to exceed or has exceeded the 25-percent limitation.

(4) If the Secretary denies a request for a waiver of the 25-percent limitation, the organization adversely affected may request a hearing pursuant to COMAR 01.02.03.

C. Disclosure of Waiver of 25-percent Limitation.

(1) As used in this regulation, the terms "gross income" and "fund-raising expenses" are limited as set forth in Article 41, §103D(a) and (b), Annotated Code of Maryland.

(2) When the Secretary, pursuant to Article 41, §103D(a), Annotated Code of Maryland, and this regulation, grants a waiver to an organization which expects to exceed the 25-

percent limitation, the organization shall disclose to the public the percentage amount authorized bythe Secretary to be used for fund-raising expenses. The organization shall print or affix this disclosure by stamp or label on each item of the goods to be sold or publications to be distributed in letters of eight-point type or larger as follows: "The percentage of gross income raised as a result of this solicitation which may be used for fund-raising expenses may not exceed ____ percent. The Maryland Secretary of State has authorized a waiver of the statutory 25-percent limitation on fund-raising expenses."

(3) When it is not feasible to print or affix this information on each item of goods to be sold, a sign disclosing the information in the form prescribed above shall be printed in block letters at least 1 inch high and conspicuously displayed at each location where the sale of goods occurs.

(4) In the case of telephone solicitation, oral communication, or media solicitation, an organization which:

(a) Expects to exceed the 25-percent limitation shall disclose in each case of solicitation the information prescribed by §C(2) above; or

(b) Does exceed the 25-percent limitation shall disclose in each case of solicitation the information prescribed in §C(5), below.

(5) An organization which exceeds the 25-percent limitation shall include for the next year in all solicitation mailings, ublications, and advertisements of any sort, a statement in letters of eight-point type or larger indicating that the limit was exceeded and disclosing the actual percentage of the total gross income raised as a result of fund-raising activities which was used for fund-raising exenses. The statement may indicate that the waiver of the 25-percent limitation on fund-raising expenses was authorized by the Secretary in accordance with the law.

STATEMENT OF THE CASE

A. The Statute and Regulations at Issue

The statute at issue in this case, Article 41, Section 103D of the Annotated Code of Maryland, provides for a flexible 25% limitation on a charity's fund-raising expenses. Section 103D does not mandate that a set amount or set percentage be spent by a charity on charitable puroses. Thus, a charity's administrative or other non-charitable expenses are in no way limited. The only expenditures that are in any limited are certain amounts spent solely on fund-raising.

Moreover, while §103D does prohibit a charity from paying or agreeing to pay fund-raising expenses "in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity," meeting such a requirement, however, is not a condition of securing registration. There is no provision for prior approval of contracts between a charitable organization and a professional fund-raiser in Maryland law. A mechanism which so provided was specifically deleted from the 1976 bill which later became §103D. See Chapter 679, Laws of Maryland for 1976. All that remains is a requirement that such contracts be filed with the Secretary of State. §103D(c). The only punishments for violating §103D are: (1) possible cancellation of registration (which is a discretinary rather than a mandatory penalty), Article 41, §103L(a) and (2) a criminal penalty, Art. 41, §103L(b).[1]

The Maryland law also contains major exemptions that further diminish the impact of the 25% restriction. Excluded from fund-

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[1] Authorization for a civil suit against a professional fund raiser by the charity was deleted from the 1976 bill. See Ch. 679, Laws of Maryland of 1976.

raising costs are all costs incurred for goods, food, entertainment, or drinks sold or provided to the public and for postage and printing expenses in connection with the solicitation. §103D(b). In addition, charities are free to pay and professional fund raisers are free to charge what they want -- without any limitation -- for "feasibility studies" and "preliminary planning." §103D(a).

Most importantly, the Maryland statute provides that:

> The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

These regulations illustrate the flexibility of the Maryland statute.[2] A charity can choose the applicable period during which the 25 percent limitation is in effect and can

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[2] In describing "a trend toward allowing more flexibility in the amount spent for fund raising," a 1977 study of the National Association of Attorneys General specifically took note of the Maryland statute. See NAAG, State Regulation of Charitable Trusts and Solicitation (Aug. 1977) at 31.

apply it retroactively on an annual basis or on a campaign-by-campaign basis. See COMAR 01.02.04.05A. The rules place no limit on the type of circumstances justifying relief from the percentage limitation. See COMAR 01.02.04.05B. Specifically identified as justifying an exemption is the case where "an organization is less than 2 fiscal years old and in the developmental stage" and "extraordinary, unusual and non-recurring circumstances." An organization can file for an exemption at any time, including after it actually exceeds the 25 percent limitation. COMAR 01.02.03.04B(3).

Finally, the Maryland law is being administered in a careful fashion with attention being paid to the First Amendment rights of advocacy groups. A 1980 Opinion of the Maryland Attorney General advised the Secretary of State that the 25 percent limitation was not to be considered as an advance requirement for registration; that a charitable organization be given a hearing before any attempt is made to cancel a registration for violation of §103D and that the Secretary consider staying such a cancellation attempt pending judicial affirmation. 65 Opinions of the Attorney General 58, 61, 64 (1980).

Significantly, the Attorney General advised that "the Secretary of State should not hesitate to grant waivers that are based on a responsible showing of justification, especially as regards the public-interest type organization described in the Schaumburg opinion." Id. at 65.[3]

B. The Proceedings Below

On March 7, 1978, the Joseph H. Munson Company, Inc. ("Munson"), an Indiana corporation operating as a professional promoter providing advice to organizations desiring to raise money, filed suit against Maryland's Secretary of State in the Circuit Court for Anne Arundel County, Maryland, seeking a declaration that it was not liable to register as a professional fund raiser under State law and that §103D of Article 41 of the Annotated Code of Maryland was unconstitutional as an unlawful delegation of legislative authority. In addition, Munson prayed for injunctive relief against enforcement of these statutes. Specifically, the firm alleged that its activities in Maryland were

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[3] Although the Respondent in this case admitted overcharges contrary to §103D since 1978, the Secretary of State did not take legal or punitive action against it or any of its clients.

limited to "advising its clients [various chapters of the Fraternal Order of Police] as to how to go about promoting a particular entertainment event" and that it "regularly charged" these chapters a fee in excess of 25 percent of the total gross income of the event. Following a motion to dismiss for failure to exhaust administrative remedies, the court dismissed the claims regarding registration of professional fund raisers but allowed the challenge to §103D to continue. The State answered and nothing occurred in the case for nearly two years, until an attempt was made to dismiss the suit for want of prosecution. After the suit was allowed to continue, Munson, on May 13, 1980, filed an amended complaint realleging the same factual averments but also raising for the first time a federal constitutional claim. The firm contended that the 25 percent limitation on fund-raising expenses contained in §103D "is unconstitutional and in violation of the First and Fourteenth Amendment[s] of the United States Constitution, as it violates the Plaintiff's right to free speech and assembly and unduly intrudes thereon." The State again answered and in an accompanying memorandum questioned Munson's standing

to bring its action.

The case was heard by the Circuit Court on the basis of a five-sentence stipulation which stated that Munson's contract with the Fraternal Order of Police called for a fee in excess of 25 percent of the net income raised via the event; that the organization was engaged in the dissemination of information and the advocacy of causes on behalf of police officers and that a single chapter of the Fraternal Order of Police was "reluctant" to enter into a contract with Munson because of §103D. The firm offered no evidence to show a connection between advocacy activities of the Fraternal Order of Police and Munson's dispensation of fund-raising advice or the particular events of individual chapters; or that any other chapter of the organization (allegedly being overcharged for fund-raising services since 1978) had refused Munson's services or was reluctant to engage them; or that any chapter of the Fraternal Order of Police had attempted to seek a waiver of the §103D limitation or was denied a requested waiver.

On July 2, 1980, the Circuit Court issued its opinion (App. 38a) upholding the

challenged statute. Relying upon National Foundation v. Fort Worth, 415 F.2d 41 (5th Cir. 1969), cert. denied 396 U.S. 1040 (1970) and distinguishing Village of Schaumburg v. Citizens for Better Environ., 444 U.S. 620 (1980), the Circuit Court held that §103D presented no prior restraint on protected activities and, because of the Secretary's power to grant exemptions to the 25 percent limitation, provided "a sufficiently flexible standard" to accommodate First Amendment rights (App. 46a). The court also found no invalid delegation of legislative power.[4] An appeal was taken by Munson to the Court of Special Appeals, which affirmed for primarily the same reasons. Joseph H. Munson Co., Inc. v. Secretary of State, 48 Md.App. 273, 426 A.2d 985 (1981)(App. 37a). The appellate court agreed there was no prior restraint and that the flexible Maryland statute with its many exceptions and provisions for waiver, fit the model of the law upheld in National Foundation as well as percentage limitation provisions upheld in Ohio, Holloway v. Brown, 62 Ohio St. 2865,

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[4] No mention was made in the Circuit Court opinion of the State's contention regarding standing.

403 N.E.2d 191 (1980) and the District of Columbia, National Black United Fund, Inc. v. Campbell, 494 F.Supp. 748 (D.D.C. 1980)(App. 34a). In conclusion the appellate court said:

> We think section 103D regulates First Amendment freedom of speech in such a way as to minimize encroachment upon individual rights while simultaneously protecting the citizenry of this State from sham and fraud. In sum, section 103D is drawn in a manner calculated to protect the public interest 'without unnecessarily interfering with First Amendment freedoms.' The statute is constitutional. (App.35a)[5]

Munson petitioned the Court of Appeals of Maryland for certiorari, contending that §103D was fatally overbroad on its face in violation of the First Amendment, and for the first time, arguing that in light of the waiver feature of §103D "the discretion vested in enforcement officials as a result of the lack of standards is itself an unconstitutional infringement on First Amendment interests." The Secretary of State cross-petitioned on the standing issue. The State's highest court agreed to hear the case

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[5] The Court of Special Appeals declined to consider the State's objection regarding Munson's standing, concluding that the issue had not been decided below. (App29a).

and reversed. First, the Court of Appeals concluded that under Schaumburg and Craig v. Boren, 429 U.S. 190, 193-197 (1976), Munson had standing to challenge the statute on its face (App. 13a). Second, without reference to the legislative history of §103D or its implementing regulations or the obvious record of its non-enforcement via a permit scheme, 65 Opinions of the Attorney General 58 (1980), the Maryland Court found an impermissible prior restraint (App. 13a). Third, the Court found no difference between the Maryland law and the statute invalidated in Schaumburg (App. 16a). In addition, the opinion suggested that the waiver feature of §103D at the same time conferred too much discretion on State officials and was "extremely narrow". (App. 20a). Thus, the Court held that §103D was violative of the First Amendment as overly broad and invalid on its face.

REASONS FOR GRANTING REVIEW

I.

THIS COURT SHOULD REVIEW THE INVALIDATION OF A PERCENTAGE RESTRICTION ON THE FUND RAISING COSTS OF CHARITIES, WHICH INVOLVES NO PRIOR RESTRAINT AND IS FLEXIBLE, MODERATE AND MORE LIMITED THAN PERCENTAGE REQUIREMENTS INDICATED AS ACCEPTABLE BY THIS COURT AND IN EFFECT IN MANY STATES.

The court below held Maryland's 25% limitation on a charity's fund-raising expenses -- a limitation which is not only modest but also flexible -- "invalid under the First Amendment of the United States Constitution." 448 A.2d at 947. To reach this holding the Maryland court created a per se rule that would effectively invalidate any percentage limitation in a charitable solicitation law.

Such a rule is unsanctioned by this Court. For this Court has never held that such percentage limitations are per se or intrinsically invalid. Indeed, in Schaumburg v. Citizens for Better Environ., 444 U.S. 620, 635-36 (1980), this Court indicated to the contrary by distinguishing the absolute and unrealistic ceiling on a charity's operations which it struck down in that case, from the flexible percentage ceiling on solicitation expenses upheld in National Foundation v. City of Fort Worth, 415 F.2d 41 (1969), cert. denied 396 U.S. 1040 (1970). And more recently in Larson v. Valente, 102 S.Ct. 1673 (1982), this Court again noted that evenhanded state regulation of charitable solicitation, including a provision for withdrawing the registration of an organization

spending "an unreasonable amount" for management, general and fund-raising costs, was not "intrinsically impermissible." Id. at 1688. Undoubtedly, it is because of this implicit approval of percentage limitations, and because of the simplicity and ease of administration afforded by such limitations, that many states have employed them to protect the contributing public and charitable beneficiaries from fraud and the charities themselves[6] from the unscrupulous practices of professional fund raisers.

However, if the per se rule adopted by the lower court is left undisturbed by this Court, and followed by the courts of other jurisdictions, it would seriously hinder any reasonable regulation of excessive fees charged charities by professional fund raisers. At present more than two-thirds of the states and numerous municipalities substantially regulate charitable solicitations both to protect the public and the

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[6] In fact, model state legislation to regulate charitable organizations proposed by thirteen national health charities, suggests a reasonable percentage limitation on fees paid professional fund raisers. See National Health Council, Model for State Legislation Regulating Charitable Organizations (1970).

charities. Moreover, twenty-one (21) states have established percentage limitations of varying degrees of flexibility and severity on the amounts a charity may pay to professional fund raisers or on those sums paid for solicitation and administration costs.[7] Many impose more difficult requirements than that contained in the Maryland statute. See, e.g. Mass. Gen. Laws Ann. Ch. 68, §21; N.H. Rev.

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[7] ARK. STAT. ANN., §64-1610 (25% to professional fund raiser); CONN. GEN. STAT., §19-323O (25% TO 50% sliding scale); FLA. STAT., §496.11 (25% to professional fund raiser); GA. CODE, §35-1008 (30% for fund raising and administrative costs); HAW. REV. STAT., §467B-7 (20% to professional fund raiser); I.. REV. STAT., §5108 (25% for fund raising and administrative costs); KAN. STAT., §17-1747 (25% for fund raising and administrative costs); MASS GEN. LAWS ANN., Ch. 68, §21 (15% to professional fund raiser); MINN. STAT., §309.555 (30% to professional fund raiser); N.H. REV. STAT. ANN., §320.20 (15% for fund raising and administrative costs); N.J. REV. STAT. §45.17A-10 (15% to professional fund raiser); N.D. CENT. CODE, §50-22-04.1 (35% total; 15% to professional fund raiser); OKLA. STAT., Tit. 18, §5523 (10% to professional fund raiser); OR. REV. STAT., §128.855 (25% for solicitation costs; 50% for solicitation and administration costs); PA. CONS. STAT. ANN., §160-6 (35% total; 15% to professional fund raiser; R.I. GEN. LAWS, 5-53-4 (50% total; 25% to professional rund raiser); S.C. CODE, ANN. §33-55-80 ("reasonable percent" to professional fund raiser); S.C. COM. LAWS ANN., §37-27-24 (30% to professional fund raiser); TENN. CODE ANN., §48-2213 (less than 25% to professional fund raiser creates rebuttable presumption of reasonableness); WASH. REV. CODE, §19.09.100 (20% for cost of solicitation); W.VA. CODE, §29-19-7 (15% to professional fund raiser).

Stat. Ann. §320.20; Okla. Stat., Tit. 18, §5523.

The critical mistake the Maryland court made was to attempt to analyze the Maryland statute as if it were the truly dissimilar statute condemned in Schaumburg. The Maryland statute and the regulations interpreting it are in fact light years away from the situation condemned in Schaumburg.

First, §103D imposes no prior restraint on protected activities. The Secretary of State has never administered §103D as a condition precedent to registration and was specifically advised not to do so. And the regulations of the Secretary permit a person to apply for an exemption from the 25 percent limitation even after §103D has been violated. Indeed, the Respondent in its brief below conceded that the Maryland statute is not "a prior restraint." Brief of Jossph H. Munson Co., Inc. at 12-13.[8] Both the trial

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[8] We do not contend that the absence of a prior restraint exempts State regulation of charitable solicitation from the requirements of the First Amendment. However, outside the area of prior restraint, State justifications for alleged interference with First Amendment rights do not have to meet an impossible burden. See Southeastern Promotion Ltd. v. Conrad, 420 U.S. 546 (1975). Absent a statutory prior

court and Maryland's intermediate appellate courts found no prior restraint. See Joseph H. Munson Co. v. Sec. of State, 48 Md.App. 273, 426 A.2d 985 (1981).

Second, this case has little, if anything, to do with speech or advocacy. Unlike Schaumburg, the record in this case does not reveal any connection between the dissemination of ideas and the charitable solicitation efforts of respondent's clients.[9] Respondent is an out-of-state professional fund raiser seeking to charge exorbitant fees for the sole function of "advising its [Maryland] clients as to how to go about promoting a particular entertainment event." It is hard to see how particular charities are harmed by a state law restricting the fees they must pay for such services. Surely, given the liberal provisions of Maryland's laws, there will always be professional fund raisers

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restraint, the respondent — a professional fund raiser — does not have standing to challenge the Maryland statute as overly broad as to advocacy groups. See infra.

[9] All the record discloses is that Respondent's clients — chapter of the Fraternal Order of Police — disseminate information and advocate causes. No such activity is described or in fact is related to particular charitable solicitations.

willing to offer such services at a 25 percent fee in Maryland, even if Munson is driven from the market.

Third, Maryland's law is a restriction on fund raising expenses not all non-charity related expenditures. In fact, in Schaumburg, the charity in question spent less than 25 percent of its income on fund raising and would not have encountered a problem under Maryland law. 444 U.S. at 626. Moreover, as outlined within, Maryland's percentage limitation contains so many generous features as to present little practical burden to a charity or responsible professional fund raiser.

Fourth, §103D is the kind of flexible limitation reviewed by this Court in National Foundation v. Fort Worth, 415 F.2d 41 (5th Cir. 1969), cert. denied 396 U.S. 1040 (1970) and endorsed in Schaumburg v. Citizens for a Better Environ., 444 U.S.620 (1980) and Larson v. Valente, 102 S.Ct. 1672, 1685 (1981). Indeed, §103D, which contains no element of prior restraint and which applies only to fund raising expenses, is an even more liberal statute than those discussed in Schaumburg and Valente.

II.

THE DEEP DIVISION AND MISUNDERSTANDING AMONG THE LOWER COURTS AS TO THE EFFECT OF THE SCHAUMBURG DECISION WHICH RESULTED IN THE UNSANCTIONED HOLDING BELOW, SHOULD BE RESOLVED BY THIS COURT.

In the two years since this Court's decision in Schaumburg, the lower courts have exhibited deep division as to the proper interpretation and true effect of that decision.

On one hand, the Supreme Court of North Dakota, State ex rel. Olsen v. WRG, 314 N.W.2D 842 (N.D. 1982), a federal district court in Missouri, Conlon v. City of North Kansas City, Missouri, 530 F.Supp. 985 (W.D. Mo. W.D. 1981) and most recently Maryland's highest court in this case, have misread Schamburg concluding that it mandates that all percentage limitations on charitable fundraising costs are per se unconstitutional. However, in the North Dakota case the challenged statute was far more restrictive than the Maryland statute at issue here; it limited charitable fund-raising expenses to 15% rather than 25%. Moreover, that case involved a prosecution by the state for alleged violation of the statute so that

there were none of the standing problems present in this case. See infra. The North Kansas City ordinance at issue in Conlon required a permit or certificate of registration before any solicitation by a charity and anyone soliciting without such a permit was subject to arrest. 530 F.Supp. at 990. Thus both earlier cases involve facts which put them closer to the Schaumburg than the case at hand. Moreover this Court, less than six months ago, after both State ex rel. Olsen v. WRG, supra, and Conlon v. City of North Kansas City, Missouri, supra, reiterated its view that a state regulation of charitable solicitation which permitted withdrawal of registration from a charity spending "an unreasonable amount" for management, general and fundraising costs" was not "intrinsically impermissible", Larson v. Valente, 102 S.Ct. 1673, 1688 (1982). Nevertheless, the Court below concluded fundraising percentage limitations were unconstitutional per se and thus Maryland's moderate, flexible limitation must fall.

On the other hand, the Supreme Court of Ohio, Holloway v. Brown, 62 Ohio St.2d 65, 403 N.E.2d 191 (1980) and the District Court for the District of Columbia, National Black

United Fund, Inc. v. Campbell, 494 F.Supp. 748, 759-60 (D.D.C. 1980), reversed on other grounds, 667 F.2d 173 (D.C. Cir. 1981), and both the trial court (App. 38a)and the intermediate appellate court (App. 23a) in this case have determined that Schaumburg does not require this result. See also, Bread Political Action v. Federal Election Comission, 635 F.2d 621,629 (7th Cir. 1980), reversed on other grounds, 102 S.Ct. 1235 (1982). Rather, they have concluded that in Schaumburg, this Court, at least indicated, that a moderate flexible percentage limitation on charitable fundraising costs, particularly if such a limitation was not part of a scheme which contained a prior restraint on speech, was permissible, and so upheld such carefully crafted statutes. This view, it may be noted, is shared by the commentators. See Village of Schaumburg v. Citizens for a Better Environment and Religious Solicitation: Freedom of Speech and Freedom of Religion Converge, 13 Loyola of Los Angeles Law Rev. 953, 955 (1980)("The Schaumburg opinion suggests that certain types of state regulations can be maintained against even constitutionally protected solicitation"); 9 Fla. State Univ. Law Rev. 185,

192 (1981)(the Court "implicitly approved the ordinance in National Foundation as an appropriate alternative to the inflexibility of the Schaumburg ordinance").

The latter conclusion is, we believe, for the reasons set forth within, not only clearly correct as a matter of constitutional law but also critically important to any effective regulation of excessive and unreasonable fundraising fees. Certiorari should be granted here so that this important public policy question, upon which the lower courts are so obviously divided and which affects many of the states and numerous local municipalities, can definitively be resolved by this Court.[10]

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10 The flexibility of a statute imposing a 25% limit on solicitation costs as part of a licensing scheme was an issue in Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981), petition for certiorari dismissed under Rule 53, 51 U.S.L.W. 3174 (Sept. 7, 1982). However that case, unlike the present one, was decided on the basis of the First Amendment's protection of religious freedom. Moreover, to the limited extent it would have presented issues similar to those in the case at hand, its dismissal eliminates the possibility of consideration of those issues by this Court in any pending case other than the one at hand.

III.

REVIEW BY THIS COURT IS NECESSARY TO RECTIFY AN UNTHINKING AND UNWARRANTED DEPARTURE FROM TRADITIONAL RULES OF STANDING THAT IS CLEARLY AT ODDS WITH DECISIONS OF THIS COURT.

Under traditional rules governing constitutional adjudication, a person to whom a statute may constitutionally be applied will not be heard to challenge the law as applied to others. Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973). There are a number of exceptions to this rule, notably cases involving certain First Amendment facial overbreadth challenge and certain claims of a litigant that a single application of a law both injures him and others [hereinafter referred to as jus tertii standing]. See Note: Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 424 (1974). However, this Court, unlike the lower court here, has never allowed these exceptions to swallow up the rule.

In Broadrick v. Oklahoma, supra, at 613, this Court said that liberalized standing in First Amendment overbreadth cases is "strong medicine" and has been employed "sparingly and only as a last resort." And in Erznoznik v. City of Jacksonville, 422 U.S. 205, 216

(1975), this Court said that when considering a facial challenge, "it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." It is for this reason that this Court has said that for liberalized standing in First Amendment overbreadth cases to exist "the overbreadth of a statute must not only be real, but substantial as well, judged in relation fo the statute's plainly legitimate sweep." Broadrick v. Oklahoma, supra, at 615.

Similarly, where jus tertii standing is alleged, this Court has generally focused on three factual elements to determine whether such standing should be accorded: (1) the presence of some substantial relationship between the litigant and third parties; (2) the impossibility of the third parties asserting their own constitutional rights; and (3) the need to avoid a dilution of third party rights that would result were the assertion of jus tertii not permitted. Singleton v. Wulff, 428 U.S. 106, 114-116 (1976); Note: Standing to Assert Constitutional Jui Tertii, 88 Harv. L. Rev. 423, 425 (1974).

The lower court has cast aside these principles of self-restraint in its rush to squeeze the Maryland statute into the Schaumburg mold. First, the Maryland Court improperly extended Schaumburg, a prior restraint case, with a factual record of real and substantial overbreadth, to a situation where none of these elements were present.

Schaumburg quite properly reflected a desire to accord liberalized standing where protected speech or conduct fell victim to the power of the censor. See Thornhill v. Alabama, 310 U.S. 88, 97 (1940)("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of expression."). However, "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner." Broadrick v. Oklahoma, supra, at 614-15. The Maryland statute and implementing regulations which allow a group to obtain a waiver of the 25-percent fundraising limitation even after that limit has been exceeded, COMAR 01.02.04.05B(3), clearly do not reveal the

hand of the censor.

Moreover, the factual predicate of real and substantial overbreadth apparent in Schaumburg is lacking here. The Schaumburg ordinance was challenged by an advocacy group that had established a relationship between its advocacy and its fundraising and that was effectively put out of business by an inflexible ceiling on all non-charitable expenditures. Schaumburg v. Citizens for a Better Environ., supra, at 626. Here, the Maryland law has been challenged by a professional fund raiser with no tangible First Amendment claim of its own who routinely overcharged Maryland organizations since 1978, apparently without fear of prosecution or penalty for itself or its clients. In addition, the sparse record establishes no connection between alleged advocacy activities of Munson's clients and the firm's furnishing of advice, or shows that any organization attempted to obtain a waiver of the 25-percent limitation which the Attorney General of Maryland had advised the Secretary of State to freely grant. Unlike the organization in Schaumburg, Munson clearly failed to show a real and substantial overbreadth necessary to assert the claims of its clients.

Nor does this Court's jus tertii decsions warrant liberalized standing in this case. Such standing requires factual predicates not present in this facial challenge to the Maryland statute. For example, there is no factual connection between Munson's services and the advocacy interests of its clients or any demonstration that the organizations will not be able to obtain the same services from others at a fee permitted under §103D. There is no reason to believe that the organizations themselves, which have neither suffered detriment from §103D nor sought a waiver of its provisions, will have their rights diluted or will be precluded from challenging the statute should the need ever arise.

For all of these reasons, the State contends that the Maryland Court's wide departure from the principles of this Court's standing cases and its unwarranted extension of Schaumburg beyond its reasonable perimeters furnishes an additional ground for review of this case.

CONCLUSION

Shortly after its enactment, the Maryland law at issue here was praised in a

national study as reflecting "a trend toward allowing more flexibility in the amount spent for fund raising." See NAAG, State Regulation of Charitable Solicitation (Aug. 1977) at 31. This "trend" has been encouraged by the Court in the National Foundation case and continued by the careful distinctions drawn in Schaumburg. However, if decisions like that of the Maryland Court in this case are allowed to stand, the trend toward flexibility in fund raising regulation will see its end and a host of reasonable fund raising limitations in other states and municipalities will be eviscerated. For these reasons and those stated above, we urge the Court to issue a writ of certiorari to the Court of Appeals of Maryland to review the judgment it entered on August 5, 1982.

Respectfully submited,

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APPENDIX

OPINION

(Filed August 5, 1982)

In The Court of Appeals of Maryland

No. 42

September Term, 1981

Joseph H. Munson Company, Inc.

v.

Secretary of State of The State of Maryland

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*Murphy, C.J., Smith, *Digges, Eldridge, Cole, Davidson, Rodowsky, JJ.*

Opinion by Eldridge, J.

The principal issue in this case is whether Maryland Code (1957, 1978 Repl. Vol.), Art. 41, § 103D, which places

* Digges, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

a limit upon the amount of expenses that a charitable organization may pay in connection with fund-raising activity, violates the First Amendment to the United States Constitution. A second issue concerns the standing of the plaintiff to raise this question.

Art. 41, § 103D, prohibits a charitable organization, in connection with any fund raising activity, from paying or agreeing to pay as expenses more than 25 percent of the gross amount raised. The statute also states that the Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay as expenses more than 25 percent of the amount raised where the 25 percent limitation would "effectively prevent the charitable organization from raising contributions."

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[1] Art. 41, § 103D(a) and (b), states:

"§ 103D. Limitations on amount of payments for solicitation activities.

(a) A charitable organization other than a charitable salvage organization may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity. The Secretary of State shall, by rule or regulation in accordance with the "standard of accounting and fiscal reporting for voluntary health and welfare organizations" provide for the reporting of actual cost, and of allocation of expenses, of a charitable organization into those which are in connection with a fund-raising activity and those which are not. The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

"The 25% limitation in this subsection shall not apply to compensation or expenses paid by a charitable organization to a professional fund-raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund-

Section 103D is part of a comprehensive subtitle, enacted by Ch. 679 of the Acts of 1976, for the purpose of regulating charitable organizations and charitable solicitations. *See* Art. 41, § 103A-103L. For example, § 103B provides for the registration of charitable organizations with the Secretary of State and the furnishing of detailed financial data to the Secretary. Under § 103F, one may not act as a professional fund-raiser counsel or a professional solicitor for a charitable organization unless he also registers with the Secretary, furnishes certain information, pays an annual fee, files a bond, and complies with the requirements of the subtitle. Section 103D(c) states that "[e]very contract or agreement between a professional fund-raiser counsel or a professional solicitor and a charitable organization shall be in writing, and a copy of it shall be filed with the Secretary of State within ten days after it is entered into and prior to any solicitations." Under § 103L(a), a charitable organization, professional fund-raiser counsel or professional solicitor is subject to criminal liability for wilfully violating the requirements of

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raising activity, such compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund-raising activity.

"(b) For purposes of this section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drink sold or provided to the public, nor should these costs be included as fund-raising costs; (2) the actual postage paid to the United States Postal Service and printing expense in connection with the soliciting of contributions, nor should these costs be included as fund-raising costs."

the subtitle.[2] Other sanctions for violating the subtitle are contained in § 103L(b) and (c).[3]

The Joseph H. Munson Co., Inc., instituted this action in the Circuit Court for Anne Arundel County, seeking declaratory and injunctive relief against the Secretary of State. Munson is in the business of promoting fund raising events and giving advice to clients on how those events should be conducted. In Maryland, Munson's clients consist of various chapters of the Fraternal Order of Police. In its amended bill of complaint, Munson alleged that it "regularly charges the said chapters of the Fraternal Order of Police an amount in excess of twenty-five percent (25%) of the total gross income of the event which it is involved in promoting." Munson further alleged

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[2] Art. 41, § 103L(a) provides (emphasis supplied):

"(a) A charitable organization, professional fund-raiser counsel, or professional solicitor which wilfully fails to file a registration statement, report, or other information with the Secretary of State or wilfully files such a statement, report, or other information which is materially false, *or otherwise wilfully violates the requirements of this subtitle*, is guilty of a misdemeanor, and upon conviction, shall be fined not more than $5,000 or sentenced to imprisonment for not more than one year, or be both fined and imprisoned. An officer, director, partner, or trustee of a charitable organization, professional fund-raiser counsel, or professional solicitor which is organized in corporate, partnership, or other organizational form who causes the entity to commit a wilful violation of this subtitle is also guilty of a misdemeanor, and, upon conviction, is subject to the same penalties as the entity."

[3] Art. 41, § 103L(b) and (c) provides:

"(b) The Secretary of State is authorized, upon complaint or upon his own motion, to investigate alleged violations of this subtitle. If he finds that a charitable organization, professional fund-raiser counsel, or professional solicitor has violated a provision of this subtitle, he may:

(1) Cancel and annul the registration of the violator;

(2) Refer the matter to the Attorney General for civil enforcement under subsection (c); and

(3) Refer the matter to the appropriate State's attorney for prosecution.

that it had been in contact with the Secretary of State, and that the Secretary had taken the position "that the Plaintiff is subject to [§ 103D] . . . and that the continued failure to comply therewith will require the Defendant to seek prosecution of the Plaintiff for violation of the said statute." In counts I and II of its five-count amended bill of complaint,[4] Munson sought a declaratory judgment as to whether it was subject to the registration and 25 percent fund-raising limitation provisions of the statute, as well as injunctive relief. In count III, Munson prayed a declaratory judgment that § 103D contained an unconstitutional delegation of legislative authority to the Secretary of State. In count V, Munson sought a declaration that § 103D on its face violates the First and Fourteenth Amendments to the United States Constitution, on the ground that the 25 percent fund-raising limitation unduly intrudes upon Munson's right to free speech and assembly. Finally, in count IV, Munson asked for an injunction restraining the Secretary from enforcing § 103D.

In its answer, the Secretary did not flatly deny that he had initially threatened Munson with criminal prosecution. Instead, the Secretary's denial of the allegation concerning threatened prosecution was on the ground that "there had been no determination concerning the applicability of the statute to the Plaintiff or that he is in violation of the Charitable Solicitation Act." The Secretary

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(c) Upon referral by the Secretary of State, the Attorney General may file a civil action in the Circuit Court for Anne Arundel County for an order restraining further violations of this subtitle, restraining the defendant from conducting any further fund-raising activities in Maryland, enforcing compliance with this subtitle, and such other relief as he deems appropriate. As a condition of registration, each charitable organization, professional fund-raiser counsel, and professional solicitor shall consent in writing to the jurisdiction and venue of the Circuit Court for Anne Arundel County to grant appropriate relief."

[4] We note that the use of counts in a bill in equity is inappropriate. Nick-George Ltd. v. Ames-Ennis, Inc., 279 Md. 385, 387 n.1, 368 A.2d 1001 (1977), Maryland Rule 370 a 1.

sought a dismissal of counts I and II on the ground that Munson had not exhausted administrative remedies created by regulations of the Secretary of State. Otherwise, the Secretary asserted that § 103D was constitutional. In a memorandum accompanying the Secretary's answer, the Secretary stated that it "seriously questions Plaintiff's standing to seek a declaratory judgment." In a supplemental memorandum of law, the Secretary argued that Munson lacked standing.

No testimony was taken in the circuit court. Instead, according to the opinion of the circuit court, the case was decided on the pleadings, the memoranda of law submitted, and a stipulation of facts. One of the stipulated facts was that "the Fraternal Order of Police, Montgomery County Chapter, . . . is reluctant to enter into a contract with the Plaintiff . . . for promotion of fund raising events due to the limitation imposed by Article 41, Section 103, . . . that nothing in excess of 25% of the gross income raised through fund raising activities may be expended on fund raising expenses." It was also stipulated that Munson's contracts with Fraternal Order of Police Chapters call for a fee for each event in excess of 25% of the *net* income raised.

The circuit court dismissed counts I and II of the amended bill of complaint on the ground that Munson had failed to exhaust administrative remedies. With regard to counts III and V, the court issued a detailed opinion and declaratory judgment that § 103D was facially valid, and that it neither amounted to an unconstitutional delegation of legislative authority nor violated the free speech guarantee of the First and Fourteenth Amendments. The court accordingly refused to enjoin enforcement of § 103D.

Munson took an appeal to the Court of Special Appeals, contending only that § 103D on its face violated the First and Fourteenth Amendments. The Secretary took no cross-appeal. The Court of Special Appeals affirmed, *Joseph H. Munson Co. v. Sec. of State*, 48 Md. App. 273, 426 A.2d 985 (1981). Munson then filed a petition for a writ of

certiorari, raising only the free speech issue under the First and Fourteenth Amendments, and the Secretary filed a cross-petition, asserting that Munson lacked standing to challenge the First Amendment validity of § 103D. We granted both the petition and the cross-petition.

I. *Standing*

A

Although we granted the Secretary's cross-petition challenging Munson's standing, a preliminary question is raised by Munson as to whether we should consider this issue. We shall assume that the Secretary properly raised the issue in the circuit court when, in a memorandum of law, it argued that the action should be dismissed for lack of standing. Instead of dismissing the action, however, the trial court in effect upheld Munson's standing and rendered a declaratory judgment on the merits of the constitutional issues presented in counts III and V of the bill of complaint. Although Munson took an appeal from the declaratory judgment, the Secretary did not file an order of appeal. Munson argues in this Court that, because of the Secretary's failure to take a cross-appeal on the issue of standing, the issue is not properly before us.

Under circumstances where absence of standing would present an alternate ground for upholding a trial court's judgment, an appellee is entitled to argue that ground in an appellate court. *Temony v. State*, 290 Md. 251, 261, 429 A.2d 1018 (1981), and cases there cited. In such situation, a cross-appeal would be unnecessary and, in fact, would be improper. *Offutt v. Montgomery Co. Bd. of Ed.*, 285 Md. 557, 564 n. 4, 404 A.2d 281 (1979). Moreover, in that situation, even if lack of standing were not raised by the appellee, an appellate court noticing the issue would normally consider it sua sponte under the principle that a judgment will ordinarily be affirmed on any ground adequately shown by the record, whether or not relied on by the trial court or raised by a party. *Robeson v. State*, 285 Md. 498, 502, 403 A.2d 1221 (1979), *cert. denied*, 444 U.S. 1021, 100 S. Ct. 680, 62 L. Ed. 2d 654 (1980).

Thus, in the case at bar, if the trial court had dismissed the action on some ground other than lack of standing, the Secretary as appellee would be entitled to argue Munson's alleged lack of standing as an alternate basis for affirmance. However, the trial court did not dismiss the action. Instead, it rendered a declaratory judgment on the merits. Munson's alleged lack of standing would not furnish an alternate ground for affirming the declaratory judgment. On the contrary, the Secretary's argument amounts to an attack upon the judgment. If the issue is properly before us, and if we agreed that Munson had no standing, we would be obliged to order that the trial court's judgment be reversed and that the case be remanded with directions to dismiss the action.

Consequently, the Secretary is attempting to challenge the trial court's judgment in this case without having taken an appeal. A party to a trial court proceeding, however, is not entitled to seek direct appellate review and reversal of the trial court's judment unless he has filed a valid, timely order of appeal. *See, e.g., Pearlman v. State*, 226 Md. 350, 173 A.2d 733 (1961); *Riviere v. Quinlan*, 210 Md. 76, 122 A.2d 332 (1956); *Gaines v. Lamkin*, 82 Md. 129, 33 A. 459 (1895); *Hopper v. Jones, Adm'r*, 64 Md. 578, 4 A. 273 (1886); *Walters v. Second Nat'l Bank of Baltimore*, 56 Md. 138 (1881); 2 Poe, *Pleading and Practice* §§ 823-824 (5th ed. H. Tiffany 1925); Maryland Rules 1010, 1011. The Secretary, not having filed an order of appeal, may not on appeal attack the trial court's declaratory judgment. Furthermore, the filing of a cross-petition for a writ of certiorari in this Court cannot overcome the failure of a purported cross-appellant to have taken an appeal from the trial court's judgment.

While the Secretary is in no position to challenge the trial court's judgment, the standing issue may be that type of question which we will resolve on our own motion. When a case is properly before us on an order of appeal and writ of certiorari, we will sua sponte address a narrow category of issues which come to our attention even

though not raised by an appellant, and which may require a reversal of the judgment below. This category includes the jurisdiction of the intermediate appellate court, the jurisdiction of the trial court, and the certain fundamental questions of policy relating to the trial court's exercise of jurisdiction. *See, e.g., Creamer v. Helferstay,* Md. , A.2d (1982) [No. 7, September Term, 1981, decided August 4, 1982] (authority of the trial court to grant a particular type of relief); *Sec., Dep't of Human Res. v. Wilson,* 286 Md. 639, 644-645, 409 A.2d 713 (1979) (failure to exhaust administrative remedies); *Attorney Gen. v. A. A. Co. School Bus,* 286 Md. 324, 407 A.2d 749 (1979) (mootness); *Biro v. Schombert,* 285 Md. 290, 293, 402 A.2d 71 (1979) (jurisdiction of the Court of Special Appeals); *Reyes v. Prince George's County,* 281 Md. 279, 282-283, 380 A.2d 12 (1977) (whether suit is collusive); *Harford County v. Schultz,* 280 Md. 77, 371 A.2d 428 (1977) (whether there is an "actual controversy" between contending parties within the meaning of the Declaratory Judgments Act); *State v. McCray,* 267 Md. 111, 126, 297 A.2d 265 (1972) (subject matter jurisdiction of the trial court). *See also Smith v. Taylor,* 285 Md. 143, 147, 400 A.2d 1130 (1979) (jurisdiction of this Court).

Several Maryland cases, however, indicate that questions concerning the plaintiff's standing to maintain the action do not fall within this category. They take the position that, if the plaintiff's alleged lack of standing is not properly raised by the defendant, an appellate court will not consider the matter. *See Toomey v. Gomeringer,* 235 Md. 456, 460-461, 201 A.2d 842 (1964); *Costello v. Seiling,* 223 Md. 24, 29, 161 A.2d 824 (1960); *Pressman v. Baltimore,* 222 Md. 330, 334, 160 A.2d 379 (1960); *Baltimore v. N.A.A.C.P.,* 221 Md. 329, 332, 157 A.2d 433 (1960); *Pumphrey v. Pumphrey,* 11 Md. App. 287, 292-293, 273 A.2d 637 (1971). On the other hand, some cases seem to suggest that the standing of a plaintiff to maintain an action is an issue which an appellate court will address on its own motion. *Reyes v. Prince George's County, supra,* 281 Md. at 287-289; *Ginn v. Farley,* 43 Md. App. 229, 232,

403 A.2d 858 (1979); *cert. denied sub nom. Engel v. Farley*, 286 Md. 747 (1980); *Balance Limited, Inc. v. Short*, 35 Md. App. 10, 11, 368 A.2d 1116 (1977). *See also Craig v. Boren*, 429 U.S. 190, 192-194, 97 S. Ct. 451, 20 L. Ed. 2d 397 (1976). The rationale for this view would appear to be that, if a plaintiff lacks standing, there may be no "interested parties" asserting adverse claims, and thus there may be no "justiciable controversy," which is a matter regularly noticed by appellate courts sua sponte. *Reyes v. Prince George's County, supra*, 281 Md. at 288; *Harford County v. Schultz, supra*. *See also Patuxent Co. v. Commissioners*, 212 Md. 543, 548-549, 129 A.2d 847 (1957).[5]

Whether there is a conflict among the above-cited cases, and whether Munson's standing is an issue properly before us, are questions which need not be resolved in the present case. If we assume for purposes of argument that the issue is before us despite the Secretary's failure to take a cross-appeal, the result will be no different, for we believe that Munson clearly had standing to challenge the facial constitutionality of Art. 41, § 103D.

B

The Secretary's contention that Munson has no standing to attack the constitutionality of § 103D seems to have two related prongs. First, the Secretary argues that § 103D only applies to charitable organizations and there has been no final administrative determination that the various chapters of the Fraternal Order of Police with which Munson contracts are charitable organizations within the meaning of § 103D. Munson, according to the Secretary, failed to exhaust its administrative remedies in this regard. Second, the Secretary contends that even if

[5] "Standing," of course, does involve principles beyond the requirement of a "justiciable controversy." Craig v. Boren, 429 U.S. 190, 193-194, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976); Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); Eisenstadt v. Baird, 405 U.S. 438, 443-445, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972).

the Fraternal Order of Police chapters are charitable organizations, Munson may not assert their First Amendment rights.

However, Munson has clearly suffered injury as a result of § 103D, as the stipulation of facts in the trial court was that the Montgomery County Chapter of the Fraternal Order of Police would not contract with Munson for promotion of fund-raising events because of the 25 percent limitation imposed by § 103.

Furthermore, Munson alleged that the Secretary had been in contact with Munson's counsel, had taken the position that Munson is subject to § 103D, and had stated that, if Munson failed to comply with the statute, the Secretary would seek prosecution of Munson. The Secretary's denial of this allegation was because there had been no final determination by the Secretary concerning the applicability of the statute to Munson or whether Munson was in violation of § 103D. Thus, the Secretary is essentially arguing a failure to exhaust administrative remedies. We have consistently held, however, that when one is attacking the validity of a statute on its face, rather than a particular application of the statute, administrative remedies ordinarily need not be exhausted. *National Asphalt v. Prince Geo's Co.*, 292 Md. 75, 77, n. 2, 437 A.2d 651 (1981); *Shipp v. Bevard*, 291 Md. 590, 599, 435 A.2d 1114 (1981); *Harbor Island Marina v. Calvert Co.*, 286 Md. 303, 308-309, 407 A.2d 738 (1979), and cases there cited.

The contention that Munson may not assert the First Amendment rights of the Fraternal Order of Police Chapters with which Munson normally contracts, is also without merit. Although ordinarily one may not assert the constitutional rights of others, nevertheless where a statute is directed at persons with whom the plaintiff has a business or professional relationship, and impairs the plaintiff in that relationship with such other persons, thereby threatening real and immediate injury to the plaintiff, he is normally accorded standing to challenge the

validity of the statute. *Craig v. Boren*, *supra*, 429 U.S. at 194-197; *Singleton v. Wulff*, 428 U.S. 106, 112-118, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976); *Doe v. Bolton*, 410 U.S. 179, 188, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 443-446, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 481, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510, 535-536, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Baltimore v. A. S. Abell Co.*, 218 Md. 273, 281-282, 145 A.2d 111 (1958).

Finally, an argument similar to that which the Secretary makes here was rejected in *Schaumburg v. Citizens For Better Environ.*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980), also involving a challenge to a charitable solicitation statute imposing a limitation like that in Art. 41, § 103D. In *Schaumburg*, the soliciting organization (CBE) had obtained summary judgment declaring the statute void and enjoining its enforcement. The defendant argued in the Supreme Court that summary judgment was inappropriate because "there was an unresolved factual dispute concerning the true character of CBE's organization" and that the defendant should have had an opportunity to show that CBE "may appropriately be deemed an organization existing for private profit rather than for charitable purposes." 444 U.S. at 633. In rejecting this argument, the Supreme Court stated (*id.* at 633-634) (footnote omitted):

> "We agree with the Court of Appeals that CBE was entitled to its judgment of facial invalidity if the ordinance purported to prohibit cavassing by a substantial category of charities to which the 75-percent limitation could not be applied consistently with the First and Fourteenth Amendments, even if there was no demonstration that CBE itself was one of these organizations. Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court. *Grayned v. City of Rockford*, 408 U.S. 104, 114-121 (1972); *Chaplinsky v.*

> *New Hampshire*, 315 U.S. 568 (1942); *Schneider v. State*, 308 U.S., at 162-165; *Lovell v. Griffin*, 303 U.S., at 451; *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). See also the discussion in *Broadrick v. Oklahoma*, 413 U.S. 601, 612-616 (1973); and in *Bigelow v. Virginia*, 421 U.S. 809, 815-817 (1975). In these First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute."

We hold, therefore, that Munson had standing to challenge the facial validity of § 103D.

II. *Constitutionality Of § 103D*

In our view, the Supreme Court's opinion in *Schaumburg v. Citizens For Better Environ., supra*, is also dispositive of the merits, and requires a declaration that § 103D is unconstitutional under the First and Fourteenth Amendments.

Schaumburg involved a municipal ordinance which required that every charitable organization intending to solicit contributions in the village " 'by door-to-door solicitation or the use of public streets and public ways, shall prior to such solicitation apply for a permit.' " 444 U.S. at 623. The permit application had to contain satisfactory proof " 'that at least seventy-five per cent of the proceeds of such solicitation will be used directly for the charitable purpose of the organization.' " *Id.* at 624. CBE, an environmental organization which solicited contributions from door-to-door, and which could not demonstrate that it would use 75 percent of the receipts for charitable purposes, brought an action for declaratory and injunctive relief.

The Supreme Court in *Schaumburg* held that the expense limitation provision of the ordinance, requiring that 75 percent of the funds collected be used for

charitable purposes, violated the free speech clause of the First Amendment, applicable to state legislation under the Fourteenth Amendment. In reaching this conclusion, the Court rejected the Village's argument that charitable solicitation is not "speech" protected by the First Amendment as long as the charity is free to propagate its views. The Court discussed and relied on several cases holding that the charitable, religious or other solicitation is protected by the First Amendment. *Schneider v. State*, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); *Jamison v. Texas*, 318 U.S. 413, 63 S. Ct. 669, 87 L. Ed. 869 (1943); *Largent v. Texas*, 318 U.S. 418, 63 S. Ct. 667, 87 L. Ed. 873 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943); *Martin v. Struthers*, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943); *Thomas v. Collins*, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945); *Hynes v. Mayor of Ordell*, 425 U.S. 610, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976). The Court also relied on *Valentine v. Chrestensen*, 316 U.S. 52, 62 S. Ct. 920, 86 L. Ed. 1262 (1942), and *Breard v. Alexandria*, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951), involving commercial solicitation, with the Court noting (444 U.S. at 632-633, n.7) that today, under *Va. Pharmacy Board v. Va. Consumer Counsel*, 425 U.S. 748, 758-759, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), commercial speech is not excluded from First Amendment protections. After reviewing these cases, the Court stated (444 U.S. at 632):

> "Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social

> issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease."

The Court then set forth what it regarded as the issue in the case (*id.* at 633):

> "The issue before us, then, is not whether charitable solicitations in residential neighborhoods are within the protections of the First Amendment. It is clear that they are. '[O]ur cases have long protected speech even though it is in the form of . . . a solicitation to pay or contribute money. *New York Times Co. v. Sullivan* [376 U.S. 254 (1964)].' *Bates v. State Bar of Arizona*, 433 U.S., at 363.
>
> "The issue is whether the Village has exercised its power to regulate solicitation in such a manner as not unduly to intrude upon the rights of free speech."

In considering whether the expense limitation unduly intruded upon free speech, the Court in *Schaumburg* characterized "the 75-percent limitation [as] . . . a direct and substantial limitation on protected activity that cannot be sustained unless it serves a strong, subordinating interest that the Village is entitled to protect." 444 U.S. at 636. Pointing out that prevention of fraud was the Village's principal justification (*ibid.*), the Court stated that many charitable organizations may use more than 25 percent of the receipts for salaries, research, etc., and that a governmental body "consistently with the First Amendment, may not label such groups 'fraudulent' and bar them from canvassing," *id.* at 636-637. The Court, in striking down the ordinance, concluded that the "legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and penal laws used to punish such conduct directly." *Id.* at 637.[6]

[6] The Court in *Schaumburg* also pointed out that requiring public "disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed." 444 U.S. at 638.

The Secretary of State argues that the instant case is distinguishable from *Schamburg* in two significant respects. It is contended that, in light of these two distinctions, the 25 percent expense limitation in § 103D is valid under the principles set forth in *Schaumburg*.

First, the Secretary states that *Schaumburg* involved a "prior restraint" upon charitable solicitation, as solicitation from door-to-door or solicitation using the public streets was absolutely prohibited unless a permit was first obtained. Under § 103D, the Secretary's argument continues, solicitation is permitted without having to obtain a permit from an administrative official. The Secretary asserts "that the Maryland statute does not impose any prior restraints on the solicitation and collection of funds." (Brief, p. 11). According to the Secretary, it is only when the solicitation is in violation of the statute that it becomes prohibited and subject to the criminal penalty in § 103L(a). The Secretary, in oral argument before us, urged that the criminal penalty under the Maryland statute was the type of criminal sanction to prevent fraud of which the Supreme Court approved in *Schaumburg*.

Preliminarily, with regard to the matter of "prior restraint," we point out that the distinction between the two statutes is not as clear-cut as the Secretary's argument seems to suggest. It is not a situation where one statute involves complete prior restraint upon charitable solicitation whereas the other statute involves no prior restraint. In fact, the Maryland Act would seem to involve a much more sweeping "prior restraint" upon protected speech than the *Schaumburg* ordinance. The *Schaumburg* ordinance required a permit only to solicit from door-to-door or by using the public streets. No permit was required for other types of charitable solicitation. Under the Maryland statute, before any charitable organization, professional fund-raiser counsel or professional solicitor is entitled to engage in *any* form of charitable solicitation, it must first submit an application to register with the Secretary of State, submit information under oath, pay a

fee, and meet other requirements. Art. 41, §§ 103B and 103F. Furthermore, under § 103F(d), no solicitation may begin until the Secretary "shall approve the registration" of a professional fund-raiser counsel or professional solicitor. And he is only to approve such registration if he finds that the application is in conformity with the requirements of the subtitle as well as the rules and regulations of the Secretary. *Ibid.*[1] It would seem that the difference

[1] Art. 41, § 103F, provides as follows:

"§ 103F. Registration of professional fund-raiser counsel and professional solicitor; bonds.

(a) A person may not act as a professional fund-raiser counsel or professional solicitor for a charitable organization unless he has first registered with the Secretary of State. Applications for registration shall be in the form prescribed by the Secretary of State, shall contain the information required by him, and shall be under oath. The application for registration by a professional fund-raiser counsel or a professional solicitor or renewal of it shall be accompanied by an annual fee of $100. A partnership, corporation or other entity which intends to act as a professional fund-raiser counsel or professional solicitor, may register for and pay a single fee of $100 on behalf of all its members, officers, agents, and employees. However, the names and addresses of all officers, agents, and employees, of the professional fund-raiser counsel or professional solicitor, and all other persons employed to work under its direction must be listed in the application.

(b) Every professional fund-raiser and professional solicitor shall, at the time of making application, file with and have approved by the Secretary of State a bond in which the applicant shall be the principal obligor in the sum of ten thousand dollars ($10,000) with one or more sureties satisfactory to the Secretary of State, whose liability in the aggregate as such sureties will at least equal the sum and maintain the bond in effect so long as a registration is in effect. The bond shall run to the State of Maryland for the use of the State and any person who may have a cause of action against the obligor of the bonds for any losses resulting from malfeasance, nonfeasance or misfeasance in the conduct of solicitation activities. A partnership or corporation which is a professional fund-raiser may file a consolidated bond on behalf of all its members, officers and employees.

(c) Each registration is valid for one year and may be renewed for additional one-year periods upon application to

between a "permit" issued by an administrative official and an "approval" of a registration application issued by an administrative official is purely a semantic one.

The Maryland statute involves a "prior restraint" upon speech in other respects. Under § 103D(c), every contract between a charitable organization and a professional fund-raiser counsel or professional solicitor must be submitted to the Secretary of State within ten days of the contract. A charity which contracts with a professional fund-raiser counsel or professional solicitor to pay as expenses more than 25 percent of the gross income raised, must under § 103D obtain a "permit" from the Secretary of State before charitable solicitation under the contract can begin.

Another example of prior restraint is found in § 103L(b) and (c). Under that section, if the Secretary believes that a charitable organization, professional fund-raiser counsel or professional solicitor has violated a provision of the subtitle, he may cancel the alleged violator's registration, or he may refer the matter to the Attorney General who is authorized to seek a court order "restraining the defendant from conducting any further fund-raising activities in Maryland."

Apart from the degree of "prior restraint" in the Maryland statute, we do not believe that, in the context

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the Secretary of State, payment of the renewal fee, and proof that the required bond, cash, or cash equivalent is and will remain in effect.

(d) If the Secretary of State finds that the application is in conformity with the requirements of this section and the rules and regulations adopted pursuant to it, and that the registrant has complied with the requirements of this subtitle and the rules and regulations adopted pursuant to it, he shall approve the registration. An applicant whose application for registration is denied, may within 30 days from the date of notification of the denial, request in writing a hearing before the Secretary of State. A hearing shall be held within 60 days from the date the Secretary of State receives the request."

here, there is any merit in the distinction drawn by the Secretary between "prior restraint" of a form of speech and criminal sanctions for engaging in a form of speech. In *Schaumburg*, the Court clearly held that charitable solicitation for funds is protected speech within the meaning of the First Amendment, and that a 25 percent limit upon the amount that could be paid for expenses unduly intruded upon the right of free speech. The Court in no way suggested that enforcement of this limitation by a criminal sanction, as opposed to a permit requirement, would make it substantially less an intrusion upon free speech. On the contrary, in reaching its conclusion, the Supreme Court relied on several cases involving criminal sanctions for solicitation rather than permit requirements. *See Hynes v. Mayor of Ordell, supra*, 425 U.S. at 612-613; *Breard v. Alexandria, supra; Martin v. Struthers, supra; Jamison v. Texas, supra, Valentine v. Chrestensen, supra.*

Lastly, it is clear that the criminal penalty for exceeding the 25 percent expense limitation, Art. 41, § 103D, is not the type of criminal penalty for fraud which the Supreme Court sanctioned in *Schaumburg*. The Secretary argues that the 25 percent expense limitation protects "the citizenry of Maryland from sham and fraud." (Brief, p. 18.) However, under the Maryland statute, if one fails to meet the 25 percent limitation in a charitable solicitation and has not obtained a permit from the Secretary waiving the limitation, he is criminally liable regardless of whether he has made fraudulent misrepresentations. The Supreme Court in *Schaumburg*, when it indicated that "less intrusive means" to prevent fraud could be used than a prohibition on solicitation if less than 75 percent went to charitable purposes, stated that "[f]raudulent misrepresentations can be prohibited and penal laws used to punish such conduct directly." 444 U.S. at 637. Obviously the Court was referring to a statute punishing only fraudulent misrepresentations, and not a statute punishing non-fraudulent solicitations if the expenses exceeded a particular percentage.

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The second distinction between *Schaumburg* and the instant case, which the Secretary argues is constitutionally significant, is that the *Schaumburg* ordinance contained no exception to the 25 percent expense limitation, whereas § 103D(a) directed the Secretary to "issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions." Because of this exception in § 103D, the Secretary argues that the Maryland statute is more flexible and "regulates First Amendment freedom of speech in such a way as to minimize encroachment on individual rights." (Brief, p. 18).

The argument that the 25 percent expense limitation in § 103D represents substantially less an intrusion upon First Amendment rights than the *Schaumburg* ordinance, is difficult to accept, considering that the *Schaumburg* ordinance was limited to solicitations from door-to-door and those using the public streets, whereas § 103D embraces all charitable solicitations including telephone solicitations, mail solicitations, speeches at meetings held in private places as well as public, etc.

Moreover, the exemption in the Maryland statute is not an exemption by virtue of the state alone; instead the Secretary of State is directed to issue regulations to provide for such exemption and to issue permits. Permit requirements to engage in protected solicitation, even with guidelines for the issuing administrative officials, were invalidated in several prior cases relied upon by the Supreme Court in *Schaumburg*. *See Largent v. Texas, supra; Cantwell v. Connecticut, supra; Schneider v. State, supra.*

Finally, the authorization for exemption regulations in the Maryland statute is extremely narrow. The Secretary,

in promulgating regulations for permits waiving the 25 percent expense limitation, is confined to "those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions." Art. 41, § 103D. In *Schaumburg*, however, the Court did not limit its concern to organizations which could not raise contributions without exceeding the 25 percent expense limitations. Rather, the Court clearly indicated that charitable organizations making a policy decision to use more than 25 percent of the proceeds raised for purposes other than "charitable," had a constitutional right to do so, that all such organizations could not be lumped with those engaging in fraud, and that the governmental body may implement its legitimate interests in preventing fraud only "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." 444 U.S. at 637.

We conclude that the limited provision in § 103D, directing the Secretary to promulgate regulations for waiver permits in those instances where the 25 percent limitation would "effectively prevent the charitable organization from raising contributions," does not save the section under the *Schaumburg* opinion.*

* Both the Court of Special Appeals and the circuit court, in upholding § 103D, relied on the pre-*Schaumburg* decision of the United States Court of Appeals for the Fifth Circuit in National Foundation v. City of Fort Worth, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040, 90 S. Ct. 688, 24 L. Ed. 2d 684 (1970). In that case, the Fifth Circuit upheld an ordinance which contained a presumption that solicitation expenses exceeding 20 percent of the amount raised were "unreasonable," although one could show that under the circumstances expenses higher than 20 percent "were not unreasonable." The statute also contained many other exemptions from the regulations of charitable solicitations, and thus from the expense limitation. The Supreme Court in *Schaumburg*, without indicating approval or disapproval of the Fifth Circuit's decision, noted that it was distinguishable. 444 U.S. at 635-636. We need not in this case decide whether *National Foundation* can be squared with the principles set forth in *Schaumburg*, because the ordinance involved in *National Foundation* was quite different than

Upon remand, the circuit court should enter a judgment declaring that Art. 41, § 103D(a) and (b), is invalid under the First Amendment to the United States Constitution. The court should also enjoin the enforcement of subsections (a) and (b) of § 103D.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED, AND CASE REMANDED TO THAT COURT WITH DIRECTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AND REMAND THE CASE FOR ENTRY OF A JUDGMENT CONSISTENT WITH THIS OPINION. RESPONDENT TO PAY COSTS.

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§ 103D. In that case, the ordinance itself contained much broader exemptions from the expense limitation. *See also* Fernandes v. Limmer, 663 F.2d 619, 630-632 (5th Cir. 1981) (applying *Schaumburg* to invalidate a statute imposing an expense limitation on charitable solicitations, and distinguishing *National Foundation* because of the exemptions in the ordinance involved in that case).

APPENDIX

OPINION

(Filed March 11, 1981)

In The Court of Special Appeals of Maryland

No. 925

September Term, 1980

Joseph H. Munson Company, Inc.,

v.

Secretary of State for the State of Maryland

Gilbert, C.J., Morton, Moore, J.J.

Opinion by Gilbert, C.J.

Sometimes a government, in its zeal to protect the governed, enacts laws that trespass unnecessarily upon the constitutional rights of some of the governed. It is extremely difficult in regulating any practice, custom, business, or industry not to trample, to a degree, upon the constitutional rights of someone. Governmental intrusion upon the constitutional rights of one group for the

protection of a larger group, while looked upon with disfavor, is not, however, *ipso facto* invalid. The test is not whether there has been an infringement upon the rights of those regulated, but rather, whether the regulation unnecessarily encroaches on the rights of the regulated.

In this appeal, we must examine a State statute in order to determine whether it is unconstitutional.

The Preamble to Laws 1976, ch. 679[1] provides in part:

> "The Governor on August 16, 1974, created a Commission on Charitable Organizations to examine the existing statutes and to make recommendations. The Commission concluded its work and found that the present laws[2] were inadequate and recommended the original bills (S.B. 287, H.B. 487) in their unamended form. These bills as introduced by the Administration were nearly identical to the 'Model for State Legislation Regulating Charitable Organizations' and endorsed by the numerous National Voluntary Health Agencies."

The Preamble also stated that bills had been "introduced in the 1975 Session as a result of impetus coming" from publications in which it was alleged that "various organizations soliciting funds from the public had excessively high administrative and other expenses, which resulted in a relatively small portion of the contributions . . . being used for their intended purpose."

Obviously, chapter 679 was enacted with the intent of protecting the public by assuring that the organization that solicited the funds was regulated as to the amount of monies that went toward "expenses in connection with . . . [the] fund-raising activity." Section 3 of that chapter created what is now also known as Md. Ann. Code art. 41, § 103D. That section provides:

> "(a) A charitable organization other than a charitable salvage organization may not pay or agree to pay

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[1] Introduced in the General Assembly as House Bill No. 777.

[2] Md. Ann. Code art. 41, §§ 103A-103E (1971 Repl. Vol.).

as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity. The Secretary of State shall, by rule or regulation in accordance with the 'standard of accounting and fiscal reporting for voluntary health and welfare organizations' provide for the reporting of actual cost, and of allocation of expenses, of a charitable organization into those which are in connection with a fund-raising activity and those which are not. The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

The 25% limitation in this subsection shall not apply to compensation or expenses paid by a charitable organization to a professional fund-raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund-raising activity, such compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund-raising activity.

(b) For purposes of this section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drink sold or provided to the public, nor should these costs be included as fund-raising costs; (2) the actual postage paid to the United States Postal Service and printing expense in connection with the soliciting of contributions, nor should these costs be included as fund-raising costs.

(c) Every contract or agreement between a professional fund-raiser counsel or a professional solicitor and a charitable organization shall be in writing, and a copy of it shall be filed with the Secretary of State

within ten days after it is entered into and prior to any solicitations."

Joseph H. Munson Company, Inc., an Indiana corporation (Munson), and a "promotion business," was desirous of entering into a contract with the Fraternal Order of Police, Montgomery County Chapter (F.O.P.). Munson was to raise funds for F.O.P., an organization, described in the stipulation of facts, which was engaged in the dissemination of information and the promotion of causes on behalf of police officers. Because of the fee limitations prescribed in the statute referred to above, no contractual relationship developed between Munson and F.O.P.

Apparently believing itself unlawfully barred *from doing business in Maryland* because of section 103D, Munson filed, in the Circuit Court for Anne Arundel County, a bill of complaint in which it sought a declaratory decree that would hold section 103D unconstitutional. The Secretary of State for the State of Maryland (Secretary) was named as defendant. The court was asked to enjoin permanently the enforcement of the registration provisions and the civil or criminal sanctions permitted by that statute.[3]

[3] The Secretary of State is charged with investigating any alleged violations of the Charitable Organizations Subtitle of Article 41, §§ 103A-103L. Upon finding a violation, subsection 103L(b) confers upon the Secretary several enforcement alternatives, namely:

"(1) Cancel and annul the registration of the violator;
(2) Refer the matter to the Attorney General for civil enforcement . . . ; and
(3) Refer the matter to the appropriate State's attorney for prosecution."

Additionally, section 103L(a) declares the criminal penalties for violating the Charitable Organizations Act to be:

"A charitable organization, professional fundraiser counsel, or professional solicitor which wilfully fails or file a registration statement, report, or other information with the Secretary of State or wilfully files such a statement, report, or other information which is materially false, or otherwise wilfully violates the requirements of this subtitle, is guilty of a misdemeanor, and, upon conviction,

The case was heard in the circuit court by Judge Eugene N. Lerner on a stipulation of facts. The judge held that Munson was not entitled to declaratory relief "since . . . [Munson] has not exhausted its administrative remedies." Furthermore, the trial judge stated that there was no improper delegation of authority to the Secretary of State, and that the statute is constitutional.

On appeal to this Court, Munson poses three questions which we believe may be stated fairly in but one,[4] scilicet:

Is Md. Ann. Code art. 41, § 103D unconstitutional on the basis that it infringes on the First Amendment right of

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shall be fined not more than $5,000 or sentenced to imprisonment for not more than one year, or be both fined and imprisoned."

[4] The three questions raised by Munson were:

"1. Should not the decision below be reversed for reason that Article 41, Section 103D of the Annotated Code of Maryland is unconstitutional and in violation of the Appellant's rights under the First and Fourteenth Amendments of the United States Constitution in light of the facts that the said statute is overbroad in its regulation of protected speech activities, in that it bears an insignificant relation to asserted State interests, fails to unilize the least drastic means available to serve such interests and fails to provide any Constitutionally sufficient exception to the 25% expense limitation?

2. Did not the lower court err in holding that the proper construction of the exception in Section 103D is sufficiently broad to include a 'flexible' percentage scheme and the statute is therefore Constitutional, in light of the facts that the plain language and obvious intent of the exception power is insufficient to create such a flexible scheme; and further, even if such a flexible scheme is included, such a scheme is no less intrusive on First Amendment interests than is a fixed percentage scheme?

3. Did not the lower court err in holding that the proper construction of the exception in Section 103D is sufficiently broad to protect First Amendment interests, in light of the fact that under such a broad construction, the discretion vested in enforcement officials as a result of the lack of standards is itself an unconstitutional infringement on First Amendment interests?"

freedom of speech, and is it an impermissible delegation of legislative authority to the Secretary?

PRELIMINARY ISSUE OF STANDING

Before we undertake to discuss the constitutionality *vel non* of section 103D, we must first consider the Secretary's contention that Munson lacks standing to challenge the statute and, therefore, is not a proper party to have brought the suit in the first instance.

Our review of the record discloses that in response to the original bill of complaint the Secretary, in a motion to dismiss, averred *inter alia* that Munson was not an "interested . . . [party] asserting adverse claims. . . ." The motion was heard by Judge H. Chester Goudy, Jr., who granted the dismissal in part and denied it in part. Significantly, he did not rule upon Munson's standing as an "interested party."

Subsequently, Munson filed an amended bill. The Secretary answered it without posing any question as to Munson's being an "interested party." Nevertheless, the Secretary did raise the question minimally in a Memorandum of Law that it submitted to Judge Lerner. We characterize the standing issue as minimally posited because in eleven pages of typing the only reference to standing is the single sentence, "The . . . [Secretary] seriously questions . . . [Munson's] standing to seek a declaratory judgment."

Apparently the Assistant Attorney General, representing the Secretary, had misgivings about the inattention given to standing in his Memorandum of Law because approximately two weeks later he submitted to Judge Lerner a "Supplemental Memorandum of Law." In the supplement, he dispelled any doubt as to the Secretary's position with respect to Munson's standing inasmuch as the entire supplemental memorandum is devoted exclusively to that question.

Judge Lerner, in his "Memorandum Opinion and Order," did not, however, address the issue of standing but denied relief strictly on the questions of constitutionality.

Md. Rule 1085 provides in part that "[t]his Court will not ordinarily decide any point or question which does not plainly appear . . . to have been tried and decided by the lower court. . . ."

We decline to consider the issue of standing because it was not decided by Judge Lerner inasmuch as he made his decision on other grounds. Md. Rule 1985. *But see, Village of Schaumber v. Citizens for a Better Environment*, 444 U.S. 620, 634, 100 S. Ct. 826, 834-35, 63 L. Ed. 2d 73 (1980); *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 1121, 14 L. Ed. 2d 22 (1964); *United States v. Raines*, 362 U.S. 17, 21, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524 (1960); *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S. Ct. 736, 742, 84 L. Ed. 2d 1093 (1939).

CONSTITUTIONALITY *VEL NON* OF
MD. ANN. CODE ART. 41, § 103D

The Supreme Court has held that the regulation of charitable solicitation is a function of the State's police power and a fulfillment of its duty to protect its citizens from fraudulent charitable organizations. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976). The Court has also recognized that First Amendment freedoms are intertwined with any type of solicitation and should be protected. *See Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) (commercial solicitation); *Hynes v. Mayor of Oradell, supra* (charitable and political solicitation); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 2d 1213 (1940) (religious solicitation). At first blush it would seem that *Hynes* is in conflict with the free speech solicitation right. The conflict, however, may be reconciled by the State's imposing reasonable regulations on charitable solicitations.

Recently, in *Village of Schaumberg v. Citizens for a Better Environment, supra*, the Court, speaking through Justice White, addressed the balancing of police power *vis-a-vis* solicitations. The Village ordinance prevented a charitable organization from obtaining a solicitation permit unless "'[s]atisfactory proof that at least seventy-five percent of the proceeds of such solicitations . . . [would] be used directly for the charitable purpose of the organization.'" (Footnote omitted.) 444 U.S. at 624, 100 S. Ct. at 829. Citizens for a Better Environment (Citizens), an organization that promoted the protection of the environment, was denied a permit by the Village inasmuch as Citizens "could not demonstrate that 75 percent of its receipts would be used for 'charitable purposes'. . . ." *Id.* at 625, 100 S. Ct. at 830. Citizens' excessive expenditures were attributed to its employment of door-to-door "canvassers" who, in addition to collecting contributions, distributed "'literature on environmental topics and answer[ed] questions of an environmental nature when posed'" and accepted complaints about the state of the environment. *Id.* As a result of the Village's refusal to grant a permit to Citizens, it challenged the ordinance on the ground that it violated its First and Fourteenth Amendment rights to freedom of speech.

The Court held that particular ordinance to be an unconstitutional infringement on freedom of speech. Chaitable solicitations are a form of speech entitled to First Amendment protection, the majority said.[5] To pass constitutional muster, any State regulation of charitable soliciation must "serve a sufficiently strong, subordinating interest . . . that the . . . [State] is entitled to protect." *Id.* at 636, 100 S. Ct. at 836. Consequently, the regulation must be drawn in such a narrow manner as to serve the State's interest "without unnecessarily interfering with First Amendment freedoms." *Id.* at 637, 100 S. Ct. at 836. *See Consolidated Edison Co. v. ublic Service Commission*, ___ U.S. ___, 100 S. Ct. 2326, ___ L. Ed. 2d ___ (1980).

[5] Justice Renquist dissented. 444 U.S. at 639-45, 100 S. Ct. at 837-40.

Earlier, in *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 340, 9 L. Ed. 2d 405 (1963), the Court had opined that "[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone. . . ." (Citations omitted.)

Although the Court believed the Village's interest in protecting its citizens from "fraud, crime and undue annoyance," was substantial, the inflexible 25% solicitation limitation was not narrowly drawn and interfered "unnecessarily" with the freedom of speech. The Court rejected Village's rationale that "any organization using more than 25 percent of its receipts on fundraising, salaries, and overhead is not a charitable, but a commercial, for profit enterprise and that to permit it to represent itself as a charity is fraudulent." 444 U.S. at 636, 100 S. Ct. at 836. The Supreme Court agreed with the United States Court of Appeals (7th Cir.) that "this cannot be true of those organizations that are primarily engaged in research, advocacy, or public education and that use their own paid staff to carry out these function *as well as solicit financial support*." (Emphasis supplied.). *Id.* Such organizations may need to spend more than 25% of the solicitation on non-charitable purposes. Village's ordinance failed to take into consideration the research, advocacy or public education type of organizations and summarily prevented them from soliciting funds for their charitable purpose.

The Court noted that "Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation." *Id.* at 637, 100 S. Ct. at 836. Among other things, Village may prohibit "fraudulent misrepresentations" and enact penal laws to punish violations.

The flaw in the ordinance that Village enacted was the ban on solicitation by any charitable organization that expended more than 25% of its funds for charitable purposes. The prior restraint imposed on all charitable

organizations without exception was an unnecessary intrusion on the freedom of speech. The ordinance either ignored or arbitrarily classified all charitable organizations as one and the same. By so doing, they failed to recognize that the research, advocacy, or educational organization fits a different mold. Moreover, the ordinance also failed to acknowledge that there might be a valid reason why more than 25% of the proceeds was needed at a given time for other than strictly charitable purposes. Even if a charitable solicitor could show clearly that a sum greater than 25% was necessary to its particular needs, the demonstration would have been to no avail because the ordinance permitted no flexibility.

Statutes or ordinances regulating the solicitation of funds by charitable organizations have, however, been judicially sanctioned. *See e.g., National Foundation v. City of Fort Worth*, 415 F.2d 41 (CA5 1969), *cert. denied*, 396 U.S. 1040 (1970). We must then look to the holdings of such cases in order to find the reason or reasons why those ordinances or statutes were free of constitutional defect.

The *National Foundation v. Fort Worth* ordinance required each charitable organization to obtain a license before solicitation of funds. The license would be denied if it was determined that an applicant was expending or was expected to spend for solicitation costs more than 20% of the gross amount raised. The 20% limitation was not, however, an inflexible barrier. An applicant with an expenditure or expected expenditure of more than the specified 20% could, nevertheless, obtain a license if it demonstrated special facts or circumstances that reasonably justified such an expenditure. The Fifth Circuit Court of Appeals said that the pliant feature in the 20% limitation buttressed the ordinance's constitutionality by recognizing that a fixed percentage "might be undesirable and inapplicable if applied to all types of charitable organizations." *Id.* at 46. Furthermore, the suppleness of

the limitation made it "a valid and constitutional means of achieving the city's purpose of protecting its citizens."*

Another case in which a charitable solicitation regulation ordinance was held to be constitutionally valid is *Holloway v. Brown*, 62 Ohio St. 2d 65, 403 N.E. 2d 191 (1980). There, a solicitation permit would not be issued if the cost of solicitation was more than 15% of the gross total raised through the solicitation. Excessive expenditures were, however, only *prima facie* evidence of unreasonableness, and the permit would be issued if the applicant could show that spending more than 15% of the gross solicitation was reasonable. The court concluded that the ordinance was sufficiently narrow to comply with *Schaumburg's* standards. Manifestly, the saving feature of the ordinance was the elasticity allowed in the percentage limitation. The limitation, coupled with the authority to increase it for good cause, enabled the local government to "screen out only those solicitations which indeed pos[ed] a substantial risk of invoking fraud or misrepresentation." *Id.* at 73-74, 191 N.E.2d at 197.

A similar regulation was addressed in *National Black United Fund, Inc. v. Campbell*, 494 F. Supp. 748 (D.C.D.C. 1980), wherein a federal program allowed charitable organizations "the luxury" of soliciting federal employees while the employees were at work. In order to be eligible for participation in the program, an organization had to meet certain requirements, one of which was a fixed percentage limitation on the cost of administrative expenses. If those expenses exceeded 25% of the organiza-

* It is interesting to note that the *Schaumburg* Court distinguished the Fort Worth ordinance from the Schaumburg ordinance and impliedly endorsed the 20% flexible limitation as a constitutional means of regulating charitable solicitation. 444 U.S. at 635, n. 9, 100 S. Ct. at 835. Unlike the Fort Worth ordinance, the regulation in *Schaumburg* failed to provide means whereby an organization, which legitimately needed to expend more that 25% on non-charitable costs, could show that the excessive cost was reasonable.

tion's annual income, the organization had to demonstrate that the excess expenditures were reasonable.

The district court stuck down the regulation on the basis that it was unconstitutionally applied. The court, however, concluded that the regulation was valid on its face. In so doing, the court recognized that the "flexible percentage limitation" distingusihed the valid federal regulation from that of the Schaumburg ordinance.

With the holdings of *Schaumburg*, *National Foundation*, *Holloway* and *National Black United Fund*, *supra*, firmly in mind, we shall begin our analysis of the above-quoted § 103D of Article 41.

We observe that the Maryland statute is similar to those found in *National Fund*, *Holloway* and *National Black United Fund*. In all three of those cases, the laws limiting solicitations were held to permit enough flexibility to survive an attack built upon First Amendment freedom of speech. While it is true that section 103D proscribes the expenditure for non-charitable purposes of more than 25% of the gross total income raised through a fund-raising activity, any charity may be exempted from the strictures of that prohibition if the charity demonstrates that "the 25% limitation would effectively prevent . . . [it] from raising contributions." An organization which legitimately needs to expend more than 25% of its total gross income for administrative costs is not summarily characterized as "fraudulent" and, thereby, subjected to prosecution, as were the charitable organizations in *Schaumburg*, *supra*.

Additionally, the spending limitation of section 103D does not place a prior restraint on the First Amendment freedom of speech associated with charitable solicitation. As we see it, section 103D regulates charitable solicitation through the means suggested by the *Schaumburg* court, namely, penal laws and financial disclosure requirements. While registration is mandated in order for a charitable organization to solicit contributions, Md. Ann. Code art. 41, § 103B, the organization is not denied registration, *ipso*

facto, if it expends more than 25% of its funds for non-charitable purposes. Irrespective of the amount spent or to be spent on solicitation, a license is issued upon completion of the registration. Should a registered charity then decide to expend more than the sanctioned 25% on non-charitable costs, without being exempted by the Secretary, it violates section 103D and is, thereby, exposed to the criminal penalties spelled out in section 103L. The threat of criminal prosecution, not prior restraint, deters fraudulent activity.

The registration statements, dictated by Md. Ann. Code art. 41, § 103B, contain an "income and expense statement, and a financial report (including the kind and amount of its gross income raised, costs and expenses incidental to the fund-raising activities . . .). . . ." Pursuant to Md. Ann. Code art. 41, § 103G, the statement becomes a public record and, of course, is open to public scrutiny. Furthermore, the actual contracts between a charity and a professional solicitor are also filed as public records, *Id.*, after having been filed with the Secretary. Md. Ann. Code art. 41, § 103D(c).

We think section 103D regulates First Amendment freedom of speech in such a way as to minimize encroachment upon individual rights while simultaneously protecting the citizenry of this State from sham and fraud. In sum, section 103D is drawn in a manner calculated to protect the public interest "without unnecessarily interfering with First Amendment freedoms." The statute is constitutional.

The Delegation of Legislative Authority

Munson's lawyers, as careful tacticians, did not "put all their eggs in one basket." They had a fall-back position. In the instant case, it took the form of an assault upon what Munson avers to be an unconstitutional delegation of legislative authority to the Secretary.

Munson asserts that section 103D vests too much discretion in the Secretary in that there are insufficient standards because reasonable guidelines are not present. We have an entirely different view.

Rarely has a statute been held unconstitutional because of an impermissible delegation of legislative power.[7] The rule used in measuring whether the Legislature has properly delegated authority is:

> The Legislature has the power to grant to an administrative agency the discretion to implement statutory provisions, through rules and regulations, provided that the agency is furnished reasonable guidelines or standards to follow in fulfilling the legislative command.

Governor of Maryland v. Exxon Corp., 279 Md. 410, 370 A.2d 1102 (1977); *Gino's of Maryland, Inc. v. City of Baltimore*, 250 Md. 621, 244 A.2d 218 (1968); *Mason v. State*, 12 Md. App. 655, 280 A.2d 753 (1971).

As we see it the Legislature has delineated clearly the guidelines to be followed by the Secretary in implementing the charitable organization's 25% "overhead" limitation whenever funds are solicited from the public. The guidelines are:

> 1) Section 103D (a) instructs the Secretary to use the "standard of accounting and fiscal reporting for voluntary health and welfare organizations" when allocating costs of an organization between those expended in connection with a fund-raising activity and those which are not.
>
> 2) Section 103D (b) sets out the expenditures which are not to be included in the total gross income when computing the 25% limitation, nor are they to be considered as fund-raising costs. The exclusions are the costs of "goods, food, entertainment, or drink sold or provided to the public" and "the actual postage

[7] Davis, 1 *Administrative Law Treatise* §§ 2.01-.16 (1958).

paid . . . and printing expense in connection with the soliciting of contributions."

3) After the authorized deductions are made from the total gross income generated by the fund-raising solicitation, the 25% limitation on non-charitable expenses is computed.

4) If the expenditure for non-charitable purposes exceeds 25% of the total gross, less allowable deductions, a charity can avoid violating section 103D if the Secretary of State determines that "the 25% limitation would effectively prevent the charitable organization from raising contributions."

The Secretary, in accordance with the legislative directive relative to the adoption of rules and regulations, has promulgated regulations that provide a mechanism through which a charitable organization can demonstrate to the Secretary that the 25% limitation would amount to prohibition of the charity's fund-raising activity. *See* COMAR .01.02.04.05-.13.

We hold that Md. Ann. Code art. 41, § 103D is not constitutionally ailing. The Legislature did not impermissibly delegate authority to the Secretary. Judge Lerner did not err in upholding the validity of the statute.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

APPENDIX

OPINION AND ORDER

(Filed July 2, 1980)

In The Circuit Court for Anne Arundel County

Equity No. 24,949

Joseph H. Munson Co., Inc., an Indiana Corporation

Plaintiff

v.

Fred L. Wineland, Secretary of State for the State of Maryland

Defendant

MEMORANDUM OF OPINION AND ORDER

This matter came on for hearing on June 16, 1980, on Plaintiff's Bill of Complaint seeking a Declaratory Judgment and Injunctive Relief. Counsel were heard in open Court and the pleadings together with memoranda filed in these proceedings have been read and considered herein by the Court.

The parties to this action have stipulated to the following facts:

1. That the Charitable Solicitation Laws contained in Article 41, Section 103, *et seq.*, of the *Annotated Code of Maryland* (1978, 1979 Cum. Supp.) which limits the amount that can be allocated for fund raising expenses are generally enforced in the State of Maryland.

2. That the Fraternal Order of Police, Montgomery County Chapter, (hereinafter referred to as FOP) is reluctant to enter into a contract with the Plaintiff, Joseph H. Munson Co., Inc., (hereinafter referred to as Plaintiff) for promotion of fund raising events due to the limitation imposed by Article 41, Section 103, *et seq.*, *supra.*, that nothing in excess of 25% of the gross income raised through fund raising activities may be expended on fund raising expenses.

3. That the Plaintiff's contract with the FOP calls for a fee in excess of 25% of the net income raised through fund raising activities.

4. That the FOP is engaged in the dissemination of information and the advocacy of causes on behalf of police officers.

5. That except for the contractual relationship regarding promotion of fund raising activities, as indicated above in Number 3, there exists no other financial relationship between the Plaintiff and the FOP.

This Court by an Order dated May 25, 1978 dismissed Counts I and II of the Plaintiff's Bill of Complaint seeking a Declaratory Judgment that the Plaintiff is not in violation of Article 41, Section 103, *et seq.*, *supra*, and an injunction to prevent the Defendant from finding that the Plaintiff is in violation of this Statute. The dismissal of Counts I and II were based on this Court's finding that a special form of remedy regarding the issues raised in the said Counts have been provided for by statute and that, therefore, the Plaintiff is not entitled to judicial relief absent an exhaustion of administrative remedies. The

Plaintiff filed an Amended Bill of Complaint realleging Counts I and II. The purpose presumably being that it wished to include same in the amended pleading to reserve for reconsideration by the Court and or for a possible appeal. This Court again dismisses Counts I and II for the same reasons. Remaining for determination are the issues raised by Counts III, IV and V of the Plaintiff's Amended Bill of Complaint. These issues will be treated in turn.

The Plaintiff in Counts III and IV alleges that among the provisions of Article 41, Section 103, *et seq.*, *supra.*, those contained in Section 103D(a) which state in part that "the Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions" represents a constitutionally impermissible delegation of legislative authority since the said provisions contain no guidelines or inadequate guidelines for the Secretary of State to implement such rules and regulations. For this reason the Plaintiff requests that Section 103D(a) be declared unconstitutional and that the Defendant, Fred L. Wineland, Secretary of State for the State of Maryland, (hereinafter referred to as the Defendant), be enjoined *pendente lite* and permanently from enforcing the terms in Article 41, Section 103D.

This Court herein finds that the Plaintiff's contention that Section 103D creates a constitutionally impermissible delegation of legislative authority is without any real merit. This Court recognizes the well established principle that, generally, a statute or ordinance vesting an administrative official with discretion to make rules or regulations without fixing any standards for guidance is an unconstitutional delegation of legislative power. *Pressman v. Barnes*, 209 Md. 544 (1956). However, the application of this principle is not without qualification. A review of recent decisions reveals that the prevailing view is

"toward a greater liberality in permitting grants of discretion to administrative officials in order to facilitate the administration of laws as the complexity of governmental and economic conditions increases." *Pressman v. Barnes, supra*, at 555; *Mason v. State*, 12 Md. App. 655 (1971). In *Governor of Maryland v. Exxon Corp.*, 279 Md. 410 (1976), the Court considered the question of unlawful delegation of legislative authority with regard to a grant of authority to the Comptroller enabling him to adopt regulations and administer exceptions from the Retail Gasoline Service Station Divestiture Statute. The Court upheld the grant of authority as proper and found that, although sufficient standards and guidelines ordinarily must be fixed when delegating legislative authority to an administrative official, it is well recognized "that the complexity of modern economic conditions makes it impossible to tailor specific guidelines for every conceivable situation and that latitude in granting discretion is necessary." *Governor of Maryland v. Exxon Corp., supra*, at 440.

This Court finds that a perusal of Article 41, Section 103D, *supra*, in its entirety shows that the power delegated to the Secretary of State to administer exceptions to the 25% expenditure limitation on charitable organizations clearly does not represent an unconstitutional delegation of legislative authority. The statute contains provisions permitting the Secretary of State to establish an exception from the 25% expenditure limitation for fund raising activities where the said limitation would effectively prevent the charitable organization from raising contributions. In permitting an exception the Secretary of State is directed to promulgate "rules and regulations in accordance with the 'standard of accounting and fiscal reporting for voluntary health and welfare organizations.'" Further, the statute provides that the 25% limitation does not apply to compensation or expenses paid to a professional fund raiser counsel for conducting feasibility studies and that the total gross income subject to the 25% limitation excludes funds raised which equal

the cost of food, drink, entertainment and goods sold or provided to the public and the actual amount expended on postage or printing expenses in connection with soliciting contributions.[1] This Court herein finds that the above mentioned provisions serve as adequate guidelines for the purpose of a constitutional delegation of legislative authority. In light of the above authorities, specifically tailored standards or guidelines outlining all or a majority of situations in which to apply the 25% limitation exception is not constitutionally required by the legislature in delegating its power. The provisions of Section 103D set forth reasonable guidelines for the Secretary of State in administering the exception without clogging up the works in the proper administration of Article 41, Section 103, *et seq.*, *supra*, in its entirety. Accordingly, this Court finds that the delegation of powers under Section 103D(a) falls within constitutional boundaries.

This Court next considers the Plaintiff's contention contained in Count V that Article 41, Section 103, *et seq.*, *supra*, which prohibits charitable organizations from paying or agreeing to pay as expenses in connection with fund raising activities a total amount in excess of 25% of the total gross income raised or received as a result of fund raising activities, is unconstitutional in violation of the right of free speech and assembly afforded by the First and Fourteenth Amendments. In support of this contention the Plaintiff relies primarily upon the decision handed down in *Village of Schaumburg v. Citizens for Better Environment*, ___ U.S. ___, S. Ct. 826 (1980), in which the Supreme Court considered the validity under the First and Fourteenth Amendments of municipal ordinance prohibiting door-to-door or on-street solicitation of contributions

[1] This Court notes that additional administrative regulations are pursuant to Article 41, Section 103, *et seq.*, *supra*, are contained in COMAR 01.02.03.01 *et seq.*, which enable an interested party to file a petition for adoption of regulations, declaratory rulings or a request for a hearing where an application for either registration or for a waiver of the 25% limitation has been rejected.

by charitable organizations that do not use at least 75% of their receipts for "charitable purposes."

The Supreme Court in that case first recognized that charitable appeals for funds involve a variety of speech interests such as communication of information and dissemination of views and ideas which are within the ambit of the First Amendment right to freedom of speech. The Supreme Court then considered the ordinance at issue in light of the right to freedom of speech. The ordinance in the *Shaumburg* decision prohibited solicitation of charitable contributions on the public streets without first applying for a permit and, further, that in order to obtain a permit the applicant must provide satisfactory proof that at least 75% of the funds raised will be used directly for a charitable purpose. The Supreme Court held that the absolute 75% limitation of the ordinance from which no exceptions were made resulted in an unconstitutionally overbroad ordinance in violation of the First and Fourteenth Amendments. The Court reasoned that regulation of charitable solicitation, though properly subject to reasonable regulation, must be carried out in a manner so as not to unnecessarily intrude upon the rights to freedom of speech.

In *Schaumburg*, the Supreme Court found that the ordinance's 75% requirement was unreasonable on its face since it effectively prohibited solicitation by a substantial category of charitable organizations to which the 75% limitation could not be applied consistently with the First and Fourteenth Amendments. Such organizations being those that are primarily engaged in research, advocacy or public education and that use their own paid staff to carry out these functions as well as to solicit financial support. The Supreme Court was unable to perceive any substantial relationship between the 75% limitation and the protection of the public from fraud or residential privacy since there was no indication that charitable organizations expending more than 25% of their funds to salaries and other expenses are more likely to employ solicitors who

would threaten the public safety than other charitable organizations. Accordingly, the *Schaumburg* ordinance impermissibly and unnecessarily infringed upon First Amendment rights because it failed to provide any discretion in the hands of the administrative officials to provide for exceptions to the 75% limitation and had the effect of a prior restraint on First Amendment rights.

In the present action the Plaintiff asserts that Article 41, Section 103, *et seq.*, *supra*, is analogous to the *Schaumburg* ordinance. The Plaintiff contends that the 25% limitation for fund raising expenses in conjunction with the exception provided by Section 103D(a) represents an unconstitutionally overbroad statutory requirement and results in a prior restraint on First Amendment rights. At oral argument, Counsel for the Plaintiff asserted that the exception under Section 103D(a) was a very narrow one allowing for an exception in only one instance and that, therefore, the exception does not provide an adequate "escape hatch" from the limitations of the statute which would enable the statute to pass constitutional muster. As a result, the Plaintiff argues that the ordinance in question is constitutionally invalid since it represents a form of regulation which unnecessarily intrudes upon the right to freedom of speech in a manner inconsistent with the First and Fourteenth Amendments.

This Court herein finds that the Plaintiff's challenge as to the validity of the ordinance in question on the basis of First and Fourteenth Amendment rights does not hold any real weight.

First, this Court finds that the *Schaumburg* decision is distinguishable from the present case. In *Schaumburg*, the ordinance in question required that a permit be obtained before a charitable organization began solicition for funds and that in order to qualify for a permit the charitable organization must satisfactorily demonstrate that 75% of the proceeds were used for charitable purposes. No

exception at all was provided from the 75% limitation. In essence, either the charitable organization qualified or it did not. The result of the ordinance was an inflexible standard which significantly infringed upon the rights of a class of charitable organizations which maintained paid employees and used less than 75% of its proceeds for charitable purposes. In the present case, the charitable organizations are not required to obtain or qualify for a permit to solicit funds by first showing that they meet the 25% limitation contained in the statute. Additionally, the statute in question provides an exception to accommodate those charitable organizations "where the 25% limitation would effectively prevent the charitable organization from raising contributions." The statute further delineates certain adjustment to the 25% limitation so as not to include some of the expenses related to solicitation such as postage, printing and the actual costs of the food, drink and entertainment provided to the public for solicitation purposes. Under the terms of the statute then, charitable organizations are not subjected to a prior restraint of their solicitation rights in violation of the First and Fourteenth Amendments since they need not obtain a permit at the outset.

Second, this Court herein finds that the exception provided under Section 103D of the statute is not drawn so narrowly as to provide an inadequate "escape hatch" in violation of the constitution. The exception explicitly empowers the Secretary of State to "permit a charitable organization to pay or agree to pay for expenses in connection with a fund raising activity more than 25% of its total gross income in *those instances* where the 25% limitation would effectively prevent the charitable organization from raising contributions. This Court interprets the above language as providing for a sufficiently broad exception allowing the statute to withstand a constitutional challenge. Under Section 103D the Secretary of State is provided with a reasonable amount of flexibility in exercising his discretion to permit a charitable organization to make expenditures in excess of the 25% limitation.

For the above reasons, this Court finds that the *Schaumburg* decision is not analogous to the present case and, therefore, its reasoning does not apply across the board to the facts of this case in order to appropriately find the statute in question unconstitutional. Rather, this Court finds that the present case is analogous to the decision presented in *National Foundation v. Fort Worth*, 415 F.2d 41 (5th Cir. 1969) *cert. denied*, 396 U.S. 1040 (1970). In that case the United States Court of Appeals considered an ordinance which contained a 20% limitation similar to the 25% limitation in the statute presently before this Court. However, the *Fort Worth* ordinance also contained a provision permitting a charitable organization to obtain a permit for solicitation by demonstrating that the costs in excess of 20% of the amount collected is reasonable under the special facts or circumstances concerning the charitable organization. The Court of Appeals upheld the *Fort Worth* ordinance as constitutional and found that the provisions of the ordinance contained reasonable standards for the regulation of charitable organizations consistent with constitutional rights. This case was cited with approval in the *Schaumburg* decision. This Court fails to see, as the Plaintiff contends, where the exception contained in the *Fort Worth* ordinance is singificantly broader than the exception contained in the statute in question. This Court finds that the words "in those instances where the 25% limitation would effectively prevent a charitable organization from raising contributions" provide a sufficiently flexible standard which impliedly takes into consideration the special circumstances of a charitable organization which may be entitled to be exempt from the 25% limitation.

For the above reasons, this Court finds that Article 41, Section 103, *et seq.*, *supra*, is valid as a constitutional means of regulating the solicitation activities of charitable organizations without impermissibly infringing upon their rights under the First and Fourteenth Amendments.

WHEREFORE, it is this 2nd day of July, 1980, by the Circuit Court for Anne Arundel County, ORDERED

That this Court, sitting as a Court of Equity, hereby declares:

1. That the Plaintiff is not entitled to a Declaratory Judgment under Count I to the effect that Plaintiff is not violating nor has violated the registration or fund raising limitations of Article 41, Section 103A, *et seq.*, *supra*, since it has not exhausted its administrative remedies.

2. That the Plaintiff is not entitled to a Declaratory Judgment under Count II to enjoin the Defendant from finding that the Plaintiff is subject to the registration provisions of Article 41, Section 103A, *et seq.*, *supra*, since it has not exhausted its administrative remedies.

3. That Article 41, Section 103D, *supra*, is not unconstitutional as alleged in Counts III and IV since the provisions of the said statute do not constitute an improper and unconstitutional delegation of legislative authority for the reasons stated in the instant Memorandum of Opinion and Order.

4. That Article 41, Section 103, *et seq.*, *supra*, which prohibits a charitable organization from paying or agreeing to pay as expenses in connection with any fund raising activity a total amount in excess of 25% of the total gross income raised by reason of the fund raising activity, is not unconstitutional since regulation of fund raising activities by charitable organizations imposed under the said statute is reasonable and is not violative of the First and Fourteenth Amendments for the reasons stated in the instant Memorandum of Opinion and Order.

It is, therefore, ORDERED, ADJUDGED and DECREED:

a. That Counts I and II of the Plaintiff's Amended Bill of Complaint, be, and the same are hereby dismissed.

b. That judgment be entered in favor of the Defendant and against the Plaintiffs with respect to Counts III, IV and V.

It is further, ORDERED, that the Plaintiff pay the costs of these proceedings.

EUGENE M. LERNER,
Judge.

Office-Supreme Court, U.S.
FILED
MAR 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-766

In The
Supreme Court of the United States
October Term, 1982

SECRETARY OF STATE OF MARYLAND,
Petitioner,

vs.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

JOINT APPENDIX

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Petition for Certiorari filed November 3, 1982
Certiorari Granted January 10, 1983

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RELEVANT DOCKET ENTRIES

Date	Proceedings
1978 March 7	Complaint
1978 April 18	Motion to Dismiss
1978 May 26	Memorandum of Opinion and Order
1978 June 9	Answer of Defendant to Bill of Complaint
1980 May 13	Amended Bill of Complaint
1980 May 22	Answer to Plaintiffs Amended Bill of Complaint
1980 June 16	Case called for Hearing on Merits, Oral Stipulation agreed upon
1980 June 16	Memorandum of Law

1980	June	27	Supplemental Memorandum of Law
1980	July	1	Memorandum of Law
1980	July	2	Memorandum of Opinion and Order
1980	Aug.	1	Order of Appeal by Plaintiff
1981	Feb.	17	Argued and held sub curia. In the Court of Special Appeals of Maryland.
1981	March	11	Opinion of Court of Special Appeals affirming Judgment. C. J. Gilbert.
1981	April	10	Mandate issued.
1981	April	27	Petition for Writ of Certiorari filed. Court of Appeals of Maryland.
1981	May	7	Answer and Cross Petition for Writ of Certiorari filed.
1981	Nov.	4	Argued and held sub curia. In the Court of Appeals of Maryland.
1982	Aug.	5	Opinion of Court of Appeals of Maryland reversing judgment of the Court of Special Appeals and directing the reversal of the judgment of the Circuit Court for Anne Arundel County.
1982	Sept.	7	Mandate of Court of Appeals of Maryland.
1982	Nov.	3	Petition for a Writ of Certiorari.
1983	Jan.	10	Certiorari granted.

WHAT MAY BE FOUND IN THE APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

1. **Opinion of the Court of Appeals of Maryland filed August 5, 1982 ..... 1APC**
2. **Opinion of the Court of Special Appeals of Maryland filed March 11, 1981 ..... 23APC**
3. **Opinion and Order filed in the Circuit Court for Anne Arundel County dated July 2, 1980 ..... 38APC**

(Title Omitted)

BILL OF COMPLAINT

(Filed March 7, 1978)

Comes now the Plaintiff, Joseph H. Munson Company, Inc., an Indiana corporation, by and through its attorneys, Yale L. Goldberg and Mark A. Winkler, and respectfully represents unto this Honorable Court as follows:

COUNT I

(Declaratory Judgment)

1. That the Plaintiff is engaged in the promotion business, providing advice to various organization-clients desiring to promote entertainment events for profit.

2. That the Plaintiff's sole contracts in the State of Maryland are those with various chapters of the Fraternal Order of Police, which is an organization whose membership are police officers banded together for professional and social activities.

3. The said contract with the said chapters of the Fraternal Order of Police involve the promotion by the Plaintiff of entertainment events as a result of which the said chapters anticipate a profit.

4. Plaintiff's activities are limited to advising its clients as to how to go about promoting a particular entertainment event.

5. In no promotion of the sale of tickets do clients of the Plaintiff represent that the profits from the said

entertainment event and program will be used for a charitable purpose.

6. That the Plaintiff regularly charges the said chapters of the Fraternal Order of Police an amount in excess of twenty-five percent (25%) of the total gross income of the event which it is involved in promoting, not including proceeds received equal to the actual cost to the organization of goods, food, entertainment, or drinks sold or provided to the public and not including the actual postage paid to the United States Postal Service and printing expense in connection with the sale of tickets.

7. The Defendant is the Secretary of State for the State of Maryland and is charged, under Article 41, Section 103 A, et seq, with the responsibility of registering professional fund raisers and overseeing the provision of Section 103 D, which prohibits a charitable organization from paying or agreeing to pay as expenses in connection with any fund raising activity a total amount in excess of twenty-five percent (25%) of the total gross income raised or received by reason of the fund raising activity.

8. Section 103 L of the said Article provides for criminal sanctions in the event of a failure to comply with the registration provisions of the said Article, as well as criminal sanctions against the principals of a charitable organization as defined in the said statute, which contracts in contravention of the terms thereof. The said section further provides for authority in the Defendant to investigate alleged violations of the statute, to cancel the registration of the violator, to refer the matter to the Attorney General for civil enforcement or to refer the matter to the appropriate State's Attorney for prosecution.

9. The Defendant has been in contact with the Plaintiff through Plaintiff's counsel and has taken the position that the Plaintiff is subject to the above referred to statute and that the continued failure to comply therewith will require the Defendant to seek prosecution of the Plaintiff for violation of the said statute. That bringing of criminal prosecution against the Plaintiff would do the said Plaintiff irreparable harm.

WHEREFORE, the premises considered, the Plaintiff, Joseph H. Munson Company, Inc., an Indiana corporation, prays this Honorable Court, pursuant to the Annotated Code of Maryland, Courts and Judicial Proceedings, Sections 3-401 et seq, enter a declaratory judgment or decree to the effect that the Plaintiff is not violating nor has not, at any time in the past, violated the registration or fund raising limitations of Code Article 41, Sections 103 A et seq (1976 Cum. Supp.).

COUNT II

(Injunctive Relief)

Plaintiff adopts and incorporates by reference herein the factual allegations contained in Count I hereof, and for further cause of action states as follows:

1. That the potential damage, in the event the Defendant determines the Plaintiff to be subject to the registration requirements of Article 41, Section 103 A et seq and its contracts subject to the limitations contained in Article 41, Section 103 D, cannot be remedied by an award of monetary damages, since the damages cannot be ascertained; and no such award may be made against a State officer. There is, therefore, no adequate remedy at law.

WHEREFORE, the premises considered, Plaintiff prays that Defendant be enjoined from finding that the Plaintiff is subject to the registration provisions of Article 41, Section 103 A, et seq and that he be further enjoined from finding that the contracts entered into by and between the Plaintiff and the Fraternal Order of Police are subject to the requirements of Article 41, Section 103 D; and that all of said relief be granted *pendente lite* and permanently.

COUNT III

(Declaratory Relief)

For further cause of action, the Plaintiff adopts and incorporates by reference herein the factual allegations contained in Count I hereof, and for further cause of action states as follows:

1. That among the provisions of Article 41, Section 103 A et seq is that contained in Section 103 D that, "The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions."

2. The said statutory provision contains no guidelines or contains inadequate guidelines for the Secretary of State to utilize an establishment of such rules and regulations, and is therefore an improper delegation of legislative authority.

WHEREFORE, the premises considered, Plaintiff prays that a declaratory judgment or decree be entered

to the effect that Section 103 D of Article 41 of the Annotated Code of Maryland (1976 Cum. Supp.) be declared unconstitutional as an improper delegation of legislative authority.

COUNT IV

(Injunctive Relief)

Plaintiff adopts and incorporates by reference the factual allegations contained in Counts I and III hereof, and for further cause of action states that the potential damage to be done if the Plaintiff were required by the Defendant to limit its maximum fee in its contract with its clients, including Chapters of the Fraternal Order of Police, could not be remedied by an award of monetary damages, since the damages cannot be ascertained; and that no such award may be made against a State officer. There is, therefore, no adequate remedy at law.

WHEREFORE, the premises considered, Plaintiff prays that the Defendant Wineland be enjoined *pendente lite* and permanently from enforcing the terms and provisions of Article 41, Section 103 D of the Annotated Code of Maryland (1976 Cum. Supp.) for reason that the delegation by the Legislature to the Secretary of State of the responsibility for issuance of rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund raising activity more than 25% of its gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions, represents an unconstitutional delegation of legislative authority.

Signatures omitted

(Title Omitted)

MOTION TO DISMISS PLAINTIFF'S BILL OF COMPLAINT

(Filed April 18, 1978)

TO THE HONORABLE,
THE JUDGE OF SAID COURT:

Now comes the Defendant, Fred L. Wineland, Secretary of State, by Francis Bill Burch, Attorney General of Maryland, and James G. Klair, Assistant Attorney General, and moves pursuant to the provisions of Rule 321, MARYLAND RULES OF PROCEDURE, for dismissal of this action, and as reasons therefor says:

1. Plaintiff, Joseph H. Munson Company, Inc., an Indiana Corporation, has filed this action for declaratory and injunctive relief requesting that the Defendant Wineland be enjoined from finding Plaintiff in violation of the Charitable Solicitation Laws contained in Article 41, Section 103A *et seq.*, and that the Defendant Wineland be enjoined from enforcing the terms and provisions of Article 41, Section 103D, which limits the amount that can be allocated for fund-raising expenses. Further, the Plaintiff requests a declaratory judgment to the effect that they had not violated registration requirements of fund-raising limitations contained in Article 41, Section 103A *et seq.*, and that the provisions of Article 41, Section 103D imposing the fund-raising limitation be declared unconstitutional as "an improper delegation of legislative authority."

2. In its Bill of Complaint, Plaintiff alleges that it is engaged in the business of promoting entertainment

events solely for various Chapters of the Fraternal Order of Police "an organization whose membership are police officers banded together for professional and social activities." As a result of these events, the various Chapters anticipate a profit. Plaintiff's activities are limited to advising its clients how to go about promoting a particular entertainment event. It is alleged that "[i]n no promotion of the sale of tickets do clients of the Plaintiff represent that the profits from the said entertainment event and program will be used for a charitable purpose." For its services, the Plaintiff regularly charges the Chapters of the Fraternal Order of Police an amount in excess of twenty-five percent (25%) of the total gross income of the event, not including proceeds received equal to the actual cost to the organization of goods, food, entertainment, or drinks sold or provided to the public and not including the actual postage paid to the United States Postal Service and printing expense in connection with the sale of tickets.

3. Chapter 679, Acts 1976, effective July 1, 1976, enacted Article 41, Sections 103A-103L, which provides for the registration and regulation of charitable organizations which solicit funds from the public for charitable purposes. Section 103B of Article 41 requires that every charitable organization, which intends to solicit contributions or to have funds solicited on its own behalf, file a registration statement with the Secretary of State. Various exemptions from this registration requirement are contained in Section 103C of Article 41 and include *bona fide* fraternal or sororal organizations if all of their fundraising activities are carried on by the members of the organization or an affiliate of it, and the members re-

ceive no compensation for performing these activities (Section 103C(a) (7)). Registration and bond requirements for professional fund-raiser counsel and professional solicitors are contained in Section 103F of Article 41. A professional fund-raiser counsel is any person who for a fee under any agreement plans, conducts, manages, carries on, advises or acts as a consultant, whether directly or indirectly, in connection with soliciting contributions for, or on behalf of, a charitable organization but who does not actually solicit contributions as a part of his services. Section 103A(g).

Limitations on the amount of payments that can be made for fund-raising activities is contained in Section 103D of Article 41. Generally, a charitable organization other than a charitable salvage organization, may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of twenty-five percent (25%) of the total gross income raised or received by reason of the fund-raising activity. Pursuant to the legislative mandate contained in Section 103D(a), the Secretary of State has promulgated regulations pertaining to the twenty-five percent (25%) limitation. Under Section 103D of Article 41, and in accordance with this regulation, the Secretary of State may permit an organization to exceed the twenty-five percent (25%) limitation upon a showing that it is necessary to the accomplishment of the organization's charitable purpose and that there is no other reasonable alternative. See COMAR 01.02. 04.05. Any person whose application for waiver of the twenty-five percent (25%) limitation, pursuant to Article 41, Section 103D is rejected by the Secretary has a right to a hearing in accordance with the Administrative Procedure

Act from which there is a right to judicial review. COMAR 01.02.03.

4. An action for declaratory judgment cannot be maintained unless certain essential elements are present. One of these elements is that a justifiable controversy must exist. There must be some interested parties asserting adverse claims upon a state of facts which must have accrued wherein a legal decision is sought. *Prince George's County v. Board of Trustees*, 269 Md. 9 (1973). Section 3-409 of the Courts and Judicial Proceedings Article, states that a court may grant a declaratory judgment in a civil case if . . . "an actual controversy exists between contending parties [or] if antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation." Absent an actual controversy, the courts of Maryland will not decide purely theoretical questions. *Prince George's County v. Chillum-Adelphi Vol. Fire Dept.*, 275 Md. 374 (1975).

5. In the instant case there is clearly a lack of an actual controversy. Plaintiff has alleged, in its Bill of Complaint, that it is in "promotion business" providing advice to various organization-clients desiring to promote entertainment events for profit. Plaintiff deals solely in this State with various Chapters of the Fraternal Order of Police, which the Plaintiff contends are organizations whose membership are police officers banded together for "professional and social activities." In the promotion of the sale of tickets, it is alleged that no representations of charitable purposes are made. It would appear that if Plaintiff is not contracting with a charitable organization as defined in Section 103A(b) and is not directly or indirectly engaging or assisting with the solicitation of con-

tributions by a charitable organization for charitable purposes then it is not bound by the twenty-five percent (25%) limitation and no controversy exists. Even if Plaintiff did assist in the promotion of an event for an organization regulated by Article 41, Section 103A *et seq.*, there is still no actual controversy and Plaintiff lacks standing to seek a declaratory judgment.

6. The Maryland Court of Appeals has consistently stated that administrative remedies must be exhausted before initiating the declaratory judgment proceeding. *Friendship Heights v. Funger*, 265 Md. 339 (1972); *Gingell v. Board of County Commissioners*, 249 Md. 374 (1968); *Poe v. Mayor of Baltimore City*, 241 Md. 303 (1966); *Pressman v. D'Alesandro*, 211 Md. 50 (1956); *Pressman v. State Tax Commission*, 204 Md. 78 (1954); *Tanner v. McKeldin*, 202 Md. 569 (1953). In the present case, Plaintiff has not exhausted his administrative remedies in that there has been no request for hearing pursuant to COMAR .01 .02 .03. Until the Secretary of State has had the opportunity to fully review the factual situation and consider a waiver of the twenty-five percent (25%) limitation and make a determination of whether the solicitation is for a charitable or noncharitable purpose. Plaintiff's administrative remedies have not been exhausted and its request for declaratory relief should be dismissed. *Patuxent Oil Co. v. County Commissioners*, 212 Md. 543 (1957); *Tanner v. McKeldin, supra.*

WHEREFORE, the Defendant, Fred L. Wineland, Secretary of State for the State of Maryland, prays and urges this Court to dismiss this action seeking injunctive and declaratory relief.

Signatures and certification omitted

IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY

EQUITY NO. 24,949

JOSEPH H. MUNSON COMPANY, INC.,
An Indiana Corporation,

Plaintiff,

vs.

FRED L. WINELAND, Secretary of State
for the State of Maryland,

Defendant.

CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

MEMORANDUM OF OPINION AND ORDER

(Filed May 26, 1978)

This case comes before the Court on the Defendant's Motion to Dismiss the Plaintiff's Bill of Complaint. The Defendant, Fred L. Wineland, Secretary of State for the State of Maryland, filed his Motion on April 18, 1978. The Plaintiff, Joseph H. Munson Company, Inc., has failed to file an Answer to the Motion within the fifteen day period allowed under Maryland Rule 321. The Court will, therefore, decide the issues raised by the Motion without a hearing.

The Plaintiff filed its Bill of Complaint on March 7, 1978. The Bill of Complaint contains four counts, but raises only two basic issues. Count I seeks a Declaratory Judgment holding that the Plaintiff is not in violation of the Charitable Organizations Act, Article 41, Section 103A-103L, of the *Annotated Code of Maryland*. Count II seeks an Injunction to prevent the Defendant from finding the

Plaintiff is violating this statute. Count III seeks a Declaratory Judgment holding that the Charitable Organizations Act is an unconstitutional delegation of legislative authority. Count IV seeks an Injunction to prevent the Defendant from enforcing the Charitable Organizations Act, based on its unconstitutionality.

The Defendant's Motion to Dismiss is addressed primarily to the issue raised in Counts I and II of the Bill of Complaint. The Defendant contends that the Plaintiff is not entitled to declaratory relief, as it has not exhausted its administrative remedies. He also contends that there is no justiciable controversy present in this case, and that declaratory relief is thus unavailable.

The Court first notes that the Defendant's second contention cannot be determined at this point. The Plaintiff's Bill of Complaint and the Defendant's Motion to Dismiss present two distinct versions of the status of this "controversy". The Bill of Complaint alleges that the Defendant has threatened criminal action if the Plaintiff does not comply with the provisions of the Charitable Organizations Act. The Motion to Dismiss alleges that the Defendant has not yet made a determination as to whether or not the Plaintiff is subject to the provisions of the Charitable Organizations Act. (An opportunity to make findings of fact on this issue is necessary before the Court can make a determination.) On the face of the Bill of Complaint, the threatened criminal prosecution would constitute a justiciable controversy. *Grimm v. County Commissioners of Washington County*, 252 Md. 626 (1969).

The Court can resolve the issue of the Plaintiff's failure to exhaust the available administrative remedies and

the effect thereof on the availability of declaratory relief. It is a well established principal that when a special form of remedy is provided by statute declaratory relief is unavailable.

The principal that special forms of remedy take precedence over declaratory relief is firmly established by a long line of Maryland cases. A number of these cases are set forth in the Motion to Dismiss and they will not be repeated here. This principal is also incorporated in the Declaratory Judgment Act, Courts and Judicial Proceedings Article, Section 3-409(b), of the *Annotated Code of Maryland*. An essential reason for this principal, and a means of testing its applicability, is that matters within the expertise of a special forum should be decided by that body.

In the present case a special form of remedy does exist. Effective February 10, 1978, a hearing procedure was established under Title 01:02:03 of the Code of Maryland Regulations, for controversies arising under the Charitable Organizations Act. (The Order adopting these procedures can be found at 5:3 Maryland Register 134. The text of these procedures can be found at 4:26 Maryland Register 2026-2028.) This hearing procedure, including the right to judicial review, is governed by the Administrative Procedure Act, Article 41, Sections 244-256A, of the *Annotated Code of Maryland*.

The Court finds that the issue raised by Counts I and II of the Bill of Complaint is within the area of the Secretary of State's expertise. These Counts deal with the applicability of the Charitable Organizations Act to the Plaintiff. The establishment of a special form of

remedy which places such determinations before the Secretary of State and the provisions of Article 41, Sections 102A-103L, of the *Annotated Code of Maryland*, can lead to no other conclusion.

The Court, for the aforegoing reasons, will grant the Motion to Dismiss as to Counts I and II.

The issue raised by Counts III and IV presents a more difficult matter for the Court's determination. The Plaintiff has challenged the constitutionality of the delegation of legislative authority to the Secretary of State involved in Article 41, Sections 103A-103L, of the *Annotated Code of Maryland*.

The Court first notes that the Defendant's exhaustion of administrative remedies argument is unavailing to his Motion to Dismiss as to Counts III and IV. The constitutionality of a particular legislative enactment has traditionally been a matter properly reserved for judicial determination, if there is no by-passing of an administrative agency in a case calling for a determination of facts within the sphere of the agency's expertness. *Pressman v. State Tax Commission*, 204 Md. 78 (1954) and cases cited therein.

The Court, in Pressman, supra, specifically held that a declaratory judgment was proper when a statute's constitutionality was challenged on the ground that its title was not descriptive of the body. In, *Schneider v. Pullen*, 198 Md. 64 (1951), it was held that a party must use the special form of remedy provided when he challenged the constitutionality of rules and regulations promulgated under a statute. But he is entitled to seek declaratory relief when he challenges the statute's constitutionality.

This case is of particular interest to this Court because the Appellant was held to have a right to challenge a statute's constitutionality on the ground of its being an improper delegation of legislative authority by way of an action for a declaratory judgment and injunction. Similarily, in, *Nottingham Village, Inc. et al v. Baltimore County, Maryland*, 266 Md. 334 (1972), it was held that available administrative remedies need not be exhausted when the constitutionality of the statute's general validity is challenged. This case also involved an action for declaratory relief and an injunction. Finally, in, *Maryland-National Capital Park and Planning Commission et al v. Washington National Arena*, 37 Md. App. 346 (1977), the Court, while finding a special exception for tax cases, quoted, *Schneider, supra*, extensively as authority for when a party may and may not proceed by way of declaratory relief without exhausting administrative remedies.

The Court concludes that the present case is controlled by the decision in, *Schneider, supra*. Counts III and IV should not and will not be dismissed for failure to exhaust administrative remedies, as they challenge the Charitable Organizations Act's constitutionality on the ground that it entails an impermissible delegation of legislative authority.

The Court has previously stated its opinion on the issue of whether a justiciable controversy exists in this case. The Plaintiff has certainly alleged a sufficiently justiciable controversy to carry it past the Defendant's Motion to Dismiss.

ORDER

Upon the aforegoing Memorandum of Opinion, it is this 25th day of May, 1978, by the Circuit Court for Anne Arundel County, in Equity,

ORDERED, that the Defendant's Motion to Dismiss is hereby granted as to Counts I and II of the Bill of Complaint, as the Plaintiff has failed to exhaust the administrative remedy provided in Title 01:02:03 of the Code of Maryland Regulations, and it is further,

ORDERED, that the Defendant's Motion to Dismiss is hereby denied as to Counts III and IV of the Bill of Complaint.

/s/ H. Chester Goudy, Jr.

Judge

cc: James G. Klair, Esquire
Yale L. Goldberg, Esquire

(Title Omitted)

ANSWER OF THE DEFENDANT TO BILL OF COMPLAINT

(Filed June 9, 1978)

TO THE HONORABLE,
THE JUDGES OF SAID COURT:

Now comes the Defendant, Fred L. Wineland, Secretary of State for the State of Maryland, by his attorneys, Francis Bill Burch, Attorney General of Maryland, and James G. Klair, Assistant Attorney General, pursuant to Rules 371 and 372, in answer to the Bill of Complaint, says:

1. The Plaintiff filed a four-count Bill of Complaint challenging the applicability and the constitutionality of the Charitable Organizations Act, Article 41, Sections 103 A-103L, of the Annotated Code of Maryland.

2. The Defendant filed a Motion to Dismiss, which was granted by this Court on May 25, 1978, as to Counts I and II, and denied as to Counts III and IV of the Bill of Complaint.

3. Counts III and IV of the Bill of Complaint incorporates by reference the factual allegations contained in Count I.

4. The Defendant is unable to admit or deny the allegations contained in Paragraphs 1, 2, 3, 4, 5 and 6 of Count I because he is without adequate knowledge as to those allegations.

5. The Defendant admits the allegations contained in Paragraphs 7 and 8 of Count I with the exception that the 25% limitation under Section 103D does not apply to compensation or expenses paid by a charitable organization to a professional fund-raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund-raising activity, such compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund-raising activity. Additionally, for purposes of that section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drink sold or provided to the public, nor should these costs be included as fund-

rais'ng costs, and (2) the actual postage paid to the United States Postal Service and printing expenses in connection with the solicitation of contributions, nor should these costs be included as fund-raising costs.

6. The Defendant denies the allegations in Paragraph 9 of Count I as there has been no determination concerning the applicability of the statute to the Plaintiff or that he is in violation of the Charitable Solicitation Act.

7. The Defendant admits the allegations contained in Paragraph 1 of Count III.

8. The Defendant denies the allegations contained in Paragraph 2 of Count III.

9. The Defendant is unable to admit or deny the allegations contained in Count IV because the Defendant is without adequate knowledge to respond to that allegation.

10. And further answering the Bill of Complaint, the Defendant avers that Article 41, Section 103D, Annotated Code of Maryland (1977 Cum. Supp.) has been duly enacted and does not contain any constitutional infirmity. Notwithstanding the factual allegations contained in the Bill of Complaint, this statute does not contain any improper delegation of legislative authority as a matter of law.

Signatures and certification omitted

(Title Omitted)

AMENDED BILL OF COMPLAINT

(Filed May 13, 1980)

Comes now the Plaintiff, Joseph H. Munson Company, Inc., an Indiana corporation, by and through its attorneys, Yale L. Goldberg and Mark A. Winkler, and respectfully represents unto this Honorable Court as follows:

COUNT I

(Declaratory Judgment)

1. That the Plaintiff is engaged in the promotion business, providing advice to various organization-clients desiring to promote entertainment events for profit.

2. That the Plaintiff's sole contracts in the State of Maryland are those with various chapters of the Fraternal Order of Police, which is an organization whose membership are police officers banded together for professional and social activities.

3. The said contract with the said chapters of the Fraternal Order of Police involve the promotion by the Plaintiff of entertainment events as a result of which the said chapters anticipate a profit.

4. Plaintiff's activities are limited to advising its clients as to how to go about promoting a particular entertainment event.

5. In no promotion of the sale of tickets do clients of the Plaintiff represent that the profits from the said entertainment event and program will be used for a charitable purpose.

6. That the Plaintiff regularly charges the said chapters of the Fraternal Order of Police an amount in excess of twenty-five percent (25%) of the total gross income of the event which it is involved in promoting, not including proceeds received equal to the actual cost to the organization of goods, food, entertainment or drinks sold or provided to the public and not including the actual postage paid to the United States Postal Service and printing expense in connection with the sale of tickets.

7. The Defendant is the Secretary of State for the State of Maryland and is charged, under Article 41, Section 103 A, et seq., with the responsibility of registering professional fund raisers and overseeing the provision of Section 103 D, which prohibits a charitable organization from paying or agreeing to pay as expenses in connection with any fund raising activity a total amount in excess of twenty-five percent (25%) of the total gross income raised or received by reason of the fund raising activity.

8. Section 103 L of the said Article provides for criminal sanctions in the event of a failure to comply with the registration provisions of the said Article, as well as criminal sanctions against the principals of a charitable organization as defined in the said statute, which contracts in contravention of the terms thereof. The said section further provides for authority in the Defendant to investigate alleged violations of the statute, to cancel the registration of the violator, to refer the matter to the Attorney General for civil enforcement or to refer the matter to the appropriate State's Attorney for prosecution.

9. The Defendant has been in contact with the Plaintiff through Plaintiff's counsel and has taken the position

that the Plaintiff is subject to the above referred to statute and that the continued failure to comply therewith will require the Defendant to seek prosecution of the Plaintiff for violation of the said statute. That bringing of criminal prosecution against the Plaintiff would do the said Plaintiff irreparable harm.

WHEREFORE, the premises considered, the Plaintiff, Joseph H. Munson Company, Inc., an Indiana corporation, prays this Honorable Court, pursuant to the Annotated Code of Maryland, Courts and Judicial Proceedings, Sections 3-401 et seq., enter a declaratory judgment or decree to the effect that the Plaintiff is not violating nor has not, at any time in the past, violated the registration or fund raising limitations of Code Article 41, Sections 103 A et seq. (1976 Cum. Supp.).

COUNT II

(Injunctive Relief)

Plaintiff adopts and incorporates by reference herein the factual allegations contained in Count I hereof, and for further cause of action states as follows:

1. That the potential damage, in the event the Defendant determines the Plaintiff to be subject to the registration requirements of Article 41, Section 103 A et seq. and its contracts subject to the limitations contained in Article 41, Section 103 D, cannot be remedied by an award of monetary damages, since the damages cannot be ascertained; and no such award may be made against a State officer. There is, therefore, no adequate remedy at law.

WHEREFORE, the premises considered, Plaintiff prays that Defendant be enjoined from finding that the

Plaintiff is subject to the registration provisions of Article 41, Section 103 A, et seq. and that he be further enjoined from finding that the contracts entered into by and between the Plaintiff and the Fraternal Order of Police are subject to the requirements of Article 41, Section 103 D; and that all of said relief be granted *pendente lite* and permanently.

COUNT III

(Declaratory Relief)

For further cause of action, the Plaintiff adopts and incorporates by reference herein the factual allegations contained in Count I hereof, and for further cause of action states as follows:

1. That among the provisions of Article 41, Section 103 A et seq. is that contained in Section 103 D that, "The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions."

2. That said statutory provision contains no guidelines or contains inadequate guidelines for the Secretary of State to utilize an establishment of such rules and regulations, and is therefore an improper delegation of legislative authority.

WHEREFORE, the premises considered, Plaintiff prays that a declaratory judgment or decree be entered to the effect that Section 103 D of Article 41 of the Annotated Code of Maryland (1976 Cum. Supp.) be declared

unconstitutional as an improper delegation of legislative authority.

COUNT IV

(Injunctive Relief)

Plaintiff adopts and incorporates by reference the factual allegations contained in Counts I and III hereof, and for further cause of action states that the potential damage to be done if the Plaintiff were required by the Defendant to limit its maximum fee in its contract with its clients, including Chapters of the Fraternal Order of Police, could not be remedied by an award of monetary damages, since the damages cannot be ascertained; and that no such award may be made against a State officer. There is, therefore, no adequate remedy at law.

WHEREFORE, the premises considered, Plaintiff prays that the Defendant Wineland be enjoined *pendente lite* and permanently from enforcing the terms and provisions of Article 41, Section 103 D of the Annotated Code of Maryland (1976 Cum. Supp.) for reason that the delegation by the Legislature to the Secretary of State of the responsibility for issuance of rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund raising activity more than 25% of its gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions, represents an unconstitutional delegation of legislative authority.

COUNT V

(Declaratory Relief)

Plaintiff adopts and incorporates by reference the factual allegations contained in Count I hereof and for further cause of action states as follows:

1. That Article 41, Sections 103, et seq. (1976 Cum. Supp.) of the Annotated Code of Maryland, which prohibits a charitable organization from paying or agreeing to pay as expenses in connection with any fund raising activity a total amount in excess of 25% of the total gross income raised or received by reason of the fund raising activity, is unconstitutional and in violation of the First and Fourteenth Amendments of the United States Constitution, as it violates the Plaintiff's right to free speech and assembly and unduly intrudes thereon.

WHEREFORE, the premises considered, Plaintiff, Joseph H. Munson Company, Inc., an Indiana corporation, prays this Honorable Court, pursuant to the Annotated Code of Maryland, Courts and Judicial Proceedings, Section 3-401 et seq., enter a Declaratory Judgment or decree to the effect that Article 41, Section 103 et seq. (1976 Cum. Supp.) of the Annotated Code of Maryland prohibiting a charitable organization from paying or agreeing to pay as expenses in connection with any fund raising activity a total amount in excess of 25% of the total gross income raised or received by reason of the fund raising activity is unconstitutional and in violation of the Plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution.

Signatures and certification omitted

(Title Omitted)

ANSWER TO PLAINTIFF'S AMENDED BILL OF COMPLAINT

(Filed May 22, 1980)

TO THE HONORABLE,
THE JUDGES OF SAID COURT:

Now comes the Defendant, Fred L. Wineland, Secretary of State for the State of Maryland, by his attorneys, Stephen H. Sachs, Attorney General of Maryland, and James G. Klair, Assistant Attorney General, pursuant to Rule 320 Maryland Rules of Procedure and in answer to the Amended Bill of Complaint says:

1. Plaintiff has filed a five count Amended Bill of Complaint challenging the applicability and constitutionality of the Charitable Organizations Act, Article 41, §§ 103A-103L of the Annotated Code of Maryland.

2. The Amended Bill of Complaint adds an additional count alleging a violation of Plaintiff's right to free speech and assembly in violation of the First and Fourteenth Amendments of the United States Constitution.

3. The Defendant filed a Motion to Dismiss to the original Bill of Complaint which was granted by this Court on May 25, 1978 as to Counts I and II and denied as to Counts III and IV of the Bill of Complaint. Since Counts I and II of the Amended Bill of Complaint are identical to the previous counts, they should be dismissed pursuant to this Court's order of May 25, 1978.

4. Counts III, IV and V of the Bill of Complaint incorporate by reference the factual allegations contained in Count I.

5. The Defendant is unable to admit or deny the allegations contained in Paragraphs 1, 2, 3, 4, 5 and 6 of Count I because he is without adequate knowledge as to those allegations.

6. The Defendant admits the allegations contained in Paragraphs 7 and 8 of Count I with the exception that the 25% limitation under § 103D does not apply to compensation or expenses paid by a charitable organization to a professional fund raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund raising activity, such compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund raising activity. Additionally, for purposes of that section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drinks sold or provided to the public, nor should these costs be included as fund raising costs, and (2) the actual postage paid to the United States Postal Service and printing expenses in connection with the solicitation of contributions, nor should these costs be included as fund raising costs.

7. The Defendant denies the allegations contained in Paragraph 9 of Count I as there has been no determination concerning the applicability of the statute to the Plaintiff or that he is in violation of the Charitable Solicitation Act.

8. The Defendant admits the allegations contained in Paragraph 1 of Count III.

9. The Defendant denies the allegations contained in Paragraph 2 of Count III.

10. The Defendant is unable to admit or deny the allegations contained in Count IV because the Defendant is without adequate knowledge to respond to that allegation.

11. The Defendant denies the allegations contained in Count V.

12. In further answering the Amended Bill of Complaint, the Defendant avers that Article 41, § 103D, Annotated Code of Maryland (1978 Repl. Vol.) has been duly enacted and does not contain any constitutional infirmity. Notwithstanding the factual allegations contained in the Amended Bill of Complaint, the statute does not contain any improper delegation of legislative authority as a matter of law.

Signatures and certification omitted

(Title Omitted)

SUPPLEMENTAL MEMORANDUM OF LAW

(Filed June 27, 1980)

TO THE HONORABLE,
THE JUDGE OF SAID COURT:

This case involves a declaratory judgment action filed by the plaintiff, an Indiana corporation, pursuant to the Maryland Uniform Declaratory Judgments Act. Courts and Judicial Proceedings Article § 3-401 *et seq.* In essence, the corporate plaintiff, while not challenging the constitutionality of the entire Charitable Organizations

Act, does attack § 103D of Article 41, which imposes a fund raising limitation, as unconstitutional. At a hearing before this Court, counsel were requested to address in a legal memorandum the question of standing of the corporate plaintiff to properly litigate in a declaratory judgment action the constitutionality of § 103D.

From the beginning of this action, which was filed some twenty-seven months ago, the defendant has argued that there are serious questions concerning the standing of the corporate plaintiff to bring this action. Clearly, a private corporation can, under the proper circumstances, bring an action challenging the validity of a statutory provision. § 3-401 Courts and Judicial Proceedings Article. Under the Uniform Declaratory Judgments Act, constitutional issues may be decided provided that there is no bypassing of an administrative agency. *Reed v. McKeldin*, 207 Md. 553 (1955). Thus, an action for a declaratory judgment will lie to determine the construction or validity of a statute or ordinance, but not where the essential elements requisite to declaratory relief are not present, as where there is no actual controversy between the parties.

Article 41, § 103D precludes a charitable organization (other than a charitable salvage organization) to pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of twenty-five percent (25%) of the total gross income raised unless a waiver of that limitation has been obtained from the Secretary of State pursuant to rules and regulations promulgated by the Secretary. Therefore, § 103D is directed to the acts of the charitable organization rather than a promoter, professional fund raiser or other entity. The cor-

porate plaintiff in this action is not a charitable organization, but is a promoter of fund raising events. Thus, the enforcement of § 103D would be directed against the charitable organization rather than the promoter who lacks standing to challenge the limitation on behalf of the charitable organization. *See Association of Independent Taxi Operators v. Yellow Cab Co.*, 198 Md. 181 (1951); *Crider v. Cullen*, 191 Md. 723 (1949). Furthermore, an actual controversy must exist between the parties in order to have standing in a declaratory judgment action. *Prince George's County v. Bd. of Trustees*, 269 Md. 9 (1973). Section 3-409 of Courts and Judicial Proceedings Article state that a court may grant a declaratory judgment in a civil case if ". . . an actual controversy exists between contending parties [or] if antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation." Absent an actual controversy, the courts of Maryland will not decide purely theoretical questions. *Prince George's County v. Chillum-Adelphi Vol. Fire Dept.*, 275 Md. 374 (1975).

In the present case there is clearly a lack of actual controversy. The corporate plaintiff has alleged that it is in the "promotion business" providing advice to various organizations-clients desiring to promote entertainment events for profit. Plaintiff deals solely in this State with various chapters of the Fraternal Order of Police which it contends are organizations whose memberships are police officers banded together for "professional and social activities". In the promotion of the sale of tickets, it is alleged that no representations of charitable purposes are made. It would appear that if plaintiff is not contracting with a charitable organization as de-

fined in § 103A(b) and is not directly or indirectly engaged or assisting with the solicitation of contributions by a charitable organization for charitable purposes, then the twenty-five percent (25%) limitation does not apply and no actual controversy exists.

Plaintiff has failed to show that it has ever asked for a ruling from the Secretary of State pursuant to the various rules and regulations promulgated to administer the Charitable Solicitation Act, as to the applicability of the Act to its activities. Clearly, the Secretary of State could hold a hearing to determine whether plaintiff is affected by the Act which then could give rise to a controversy. Plaintiff has failed to take this initial step and, in fact, has not shown any evidence that it is in imminent danger of harm. Certainly nothing has occurred during the twenty-eight months this case has been pending. The defendant submits that because the administrative remedies have been by-passed and since there appears to be no actual controversy established by the plaintiff and because the corporate plaintiff cannot challenge a statutory provision which is applied to charitable organizations rather than promoters, the plaintiff does not have standing to challenge the twenty-five percent (25%) limitation contained in § 103D of Article 41. *Pressman v. State Tax Comm'n*, 204 Md. 78 (1954) and cases cited therein.

For these reasons, the defendant requests that this Honorable Court dismiss the Bill of Complaint seeking declaratory and injunctive relief on the basis that the corporate plaintiff lacks standing to challenge § 103D of Article 41.

Signatures and certification omitted

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Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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No. 82-766

In The

Supreme Court of the United States

October Term, 1982

SECRETARY OF STATE OF MARYLAND,
Petitioner,

v.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

On Petition For Writ Of Certiorari To The
Court of Appeals of Maryland

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

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SECRETARY OF STATE OF MARYLAND,
Petitioner,

v.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

Opposition To Petition For Writ of Certiorari

RESPONDENT'S STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case except as set forth below.

The Joseph H. Munson Company, Inc. (Munson) is an Indiana corporation engaged in the business of advising organizations which desire to raise funds through entertainment and other social events, and of promoting and conducting such events. For these services, Munson receives a percentage of the total amount of receipts from a given event.

Munson provides a complete service to its client organizations. After being advised by Munson of the options available for raising funds, an organization chooses the event it favors the most. Munson then contracts for the entertainment (or other focus of the event), the location, the necessary materials and supplies, etc.; in other words, all of the details of the fundraising activity.

In the State of Maryland, Munson's sole clients are the various chapters of the Fraternal Order of Police. This organization has as its purpose the furtherance of the economic, professional and social well-being of its member officers through activities that disseminate information about, and advance the cause of, issues considered important to police officers as a group.

The contracts between Munson and the various chapters provide for payments to Munson in excess of the amounts permitted under the Maryland statute. Consequently, Munson has been informed that the chapters will cease contracting for fundraising activities with the company for fear of criminal sanctions being taken against them by the State.

The provisions of the Maryland statute are generally enforced by the State government. Officials of the State have contacted Munson and its counsel to inform them that the failure to adhere to the provisions of §103D would result in the State filing criminal charges for the violations.

In response to these events, Respondent Munson brought an action for declaratory and injunctive relief against the Secretary of State of Maryland, the officer charged with enforcement of the statute at issue, in March of 1978. An amended complaint was filed in May of 1980, said complaint being the first allegation by Respondent of any federal constitutional claims. The trial of the case was upon this amended complaint. Respondent's arguments and claims are the same as were made at trial, to the Court of Special Appeals, to the Court of Appeals, and to this Court.

REASONS AGAINST GRANTING REVIEW

I. THIS COURT SHOULD NOT EXERCISE ITS DISCRETIONARY POWER TO ISSUE A WRIT OF CERTIORARI FOR REVIEW OF THIS CASE FOR THE REASON THAT THE DECISION AND OPINION BELOW IS IN STRICT CONFORMITY WITH THE DICTATES OF *SCHAUMBERG*, AND IS THEREFORE CORRECTLY DECIDED.

The Court of Appeals of Maryland, in an opinion filed August 5, 1982, held that Article 41, section 103D of the Annotated Code of Maryland, 1957 (1978 Repl. Vol.) is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. The court found that although the Maryland statute differed in minor respects from the statute at bar in *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), it was, nevertheless, a clear infringement on First Amendment interests and therefore could not pass constitutional muster as established by this Court in *Schaumburg*. Since the decision below is in strict conformity with the case law of this Court as represented by *Schaumburg*, the result is correct as a matter of Federal constitutional law and there is no reason for further review by this Court.

Petitioner argues that the Maryland statute is so different from the Illinois statute, that the former is constitutional even though the latter has been declared invalid. Respondent contends, and the Court of Appeals of Maryland held, that the minor differences in the detail of the statutes do not result in any difference in the effect on protected speech interests, and therefore, the Maryland statute is unconstitutional. For the reasons set forth below, it is our contention that *Schaumburg* is dispositive of this cause, and we urge this Court not to issue a writ of certiorari for its review.

The relevant differences between the Maryland and Illinois laws are: first, the *Schaumburg* ordinance was limited to door-to-door solicitation, while §103D covers *all* fundraising; second, the Maryland statute apparently does not "bar" organizations previously exceeding the limit from future soliciting, but instead subjects those organizations to criminal sanctions, while the *Schaumburg* ordinance would deny a permit to such organizations; and, third, §103D provides that Petitioner may exempt organizations from the percentage limitation ("...where the 25% limitation would effectively prevent the charitable organization from raising contributions"), while the *Schaumburg* ordinance had no exceptions.

The first two differences are inconsequential to this Petition. The greater coverage of the Maryland statute makes it an even greater infringement on protected interests than was the Illinois law. *(Pet. App.* 16a).[1] As for the second difference, Petitioner cites it as proof of a lack of "prior restraint" in the Maryland statute. *Petition* at 21. This argument begs the question before the Court. If, as Respondent contends, §103D is an unconstitutional infringement on protected interests, it matters little that in Maryland one can continue to solicit in violation of the statute, since such activity would expose that person to criminal sanctions for First Amendment activity. Regardless of the particular regulatory scheme at bar, this Court has never failed to hold invalid any statute or regulation that, on its face, establishes criminal sanctions for constitutionally protected conduct.

This leaves the only relevant difference between the *Schaumburg* decision and the instant case—the exemption power contained in §103D. (See *Petition* at 3 for text). Upon examination of that power, it is apparent that the Maryland statute is constitutionally indistinguishable from the *Schaumburg* ordinance, and therefore was properly invalidated by the court below.

Respondent's primary argument, made at trial and to both courts of appeal, is that the groups identified as protected by this Court in *Schaumburg*, 444 U.S. at 633-34, must be excluded from the sweep of the Maryland statute in order to make that statute constitutional.[2] Clearly, without the exemption power, the Maryland statute is exactly the statute struck down in *Schaumburg*. And the exception, by its own terms, is so narrow and specific that it cannot possibly include within its scope all protected organizations.

[1]Since the Petitioner has provided all necessary material in the Appendix to the Petition, Respondent will refer to parts of that appendix as "*Pet. App.* ____," as is done here, and refer to parts of the Petition itself as "*Petition at* ____."

[2]This Court noted that "conduit" type organizations (e.g., the United Way) might be constitutionally regulated by a percentage scheme. 444 U.S. at 635.

The exception gives the Secretary the ability to waive the 25 percent limitation only when an organization is "effectively prevented" from raising contributions. Nothing in the exemption power as written would help a protected organization (as defined in *Schaumburg*) which was not "effectively prevented" from raising *any* contributions, but which felt that the information and views it supported would be communicated better or to more citizens by the use of a more expensive fundraising activity. Under such circumstances, the activity chosen as best by the organization would be effectively vetoed by the hanging threat of criminal prosecution for violating §103D, while the power to grant an exemption would be unavailable since contributions *could* be raised by other, less desirable (from a "dissemination of information" standpoint) but cheaper methods.

Therefore, the Maryland Court of Appeals correctly concluded that ". . .the limited provision in §103D. . .does not save the section under the *Schaumburg* opinion." *Pet.App.* 21a (footnote omitted).

While considering *Schaumburg* to be dispositive of the issues in the case, Respondent also urged upon all three lower courts an alternative analysis based upon the equally serious constitutional infirmity of "local discretion."[3] Such an argument was alluded to in *Schaumburg*, but left undecided, because the statute at bar in that case provided no exception to the 25 percent limitation. Respondent correctly feared that the mention of a "flexible statute" case, *National Foundation* v. *Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert.den.*, 396 U.S. 1040 (1970), in the *Schaumburg* opinion as an "alternative" to a fixed percentage limitation would be misinterpreted as an approval of an exception power such as the one contained in §103D. See 444 U.S. at 635.

[3]The Secretary incorrectly states in her Petition that Respondent raised the local discretion—vagueness issue only in the Court of Appeals. *Petition* at 16. In fact, Respondent has made this argument in each of the three courts below; only the Court of Appeals has been willing to address the issue in its opinion. *Pet.App.* 20a.

Respondent is confident in labeling such an inference of approval as incorrect. Since the only issue before the *Schaumburg* Court was overbreadth, the reference to the flexible *Fort Worth* statute was correct—a truly "flexible" statute would permit more protected groups to exercise their rights, i.e., it would not be *as* overbroad. What was not addressed, because the issue was not before the *Schaumburg* Court[4], was whether such a flexible statute would so far rely on official discretion as to render it unconstitutionally vague under *Hynes* v. *Mayor of Oradell*, 425 U.S. 610 (1976)[5]. See *Schaumburg*, 444 U.S. at 642-643 (Rehnquist, J., dissenting).

The problem with the waiver feature as an answer to the objection of overbreadth is that there is nothing in the Maryland statute that indicates that each group in the class identified as "protected" under *Schaumburg* is entitled to the waiver. In other words, it is no answer to trade away overbreadth for excessive discretion and vagueness. Furthermore, it is the mere existence of this discretion, not its abuse, that results in a "continuous and pervasive restraint" on protected activity. *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940).

Therefore, Respondent contends that even assuming arguendo that the narrow, limited exception contained in §103D was suddenly judicially rewritten into a full-fledged *Fort Worth*-type flexible percentage statute, such a statute would itself be objectionable as placing excessive discretion in the hands of the enforcement officer (the Secretary of State). Since the decision below was in accord with the principles of both *Schaumburg* and *Hynes* (and their progeny), review of this cause by certiorari is unnecessary, and Respondent urges that the Petition be denied.

II. THIS COURT SHOULD NOT REVIEW A CASE SUCH AS THIS IN WHICH THE MAJOR ISSUE WAS ONE OF STATE STATUTORY INTERPRETA-

[4]It is axiomatic that this Court will not decide issues not necessary to the resolution of the case before it.

[5]"Vagueness" is a term that includes "local discretion" as one type of vagueness. A statute with excessive local discretion means that the statute is vague to the enforcement authorities, resulting in less than consistent application and enforcement.

TION, AND THAT INTERPRETATION, BY THE HIGHEST COURT OF THE STATE, RESULTED IN THE INVALIDATION OF THAT STATUTE AS VIOLATING THE UNITED STATES CONSTITUTION.

The first question presented for review by Petitioner far exceeds the actual issues raised in this cause. Notwithstanding the Petitioner's statement ". . .the Maryland court created a *per se* rule that would effectively invalidate any percentage limitation in a charitable solicitation law. . ." (*Petition* at 18), the Court of Appeals of Maryland's opinion hardly calls for such alarm. The basis of the decision and opinion was the judicial interpretation of §103D by the highest court of the state, and that interpretation concluded, as Respondent has consistently argued, that the limited and narrow waiver provision of the Maryland statute is plainly insufficient to constitutionally distinguish §103D from the *Schaumburg* statute.

The Maryland court held that, like *Schaumburg*, the statute substantially infringes on First Amendment freedoms, but was no more substantially related to asserted state interests, nor was any less drastic in its means to effect those interests, than was the Illinois law. *Pet.App.* 13a-21a. There is no support anywhere in the opinion for the assertion that the Maryland court read *Schaumburg* as a *per se* invalidation of percentage limitation regulation.

The opinion, therefore, makes no new law, or decides any point of law in conflict with the applicable decisions of this Court. The court below simply interpreted a state statute, and applied the analysis set forth by the *Schaumburg* Court. The interpretation of a state statute by the highest court of a state is entitled to some measure of deference in this Court, and the interpretation given by the Court of Appeals of Maryland made the issue in this case merely one of straightforward application of *Schaumburg*.

While it may be true that *Schaumburg* left undecided the question of whether *any* percentage limitation statute could pass constitutional muster, resolution of this issue is not necessary for the resolution of the case at bar. Therefore, the discretionary review of this case by writ of certiorari is unnecessary, and the Petition should be denied.

The second question presented for review again tries to make "prior restraint" an issue material to the resolution of this case. As noted earlier, even if an organization may register without compliance, or apply for waiver after noncompliance, the fact remains that if a protected organization exceeds the percentage limit, it is subject to criminal prosecution for activity protected by the First Amendment. *Schaumburg*, 444 U.S. at 632.

The Maryland court responded to the "prior restraint" argument by stating that the minor difference between the Maryland and Illinois statutes in their method of enforcement ". . .is purely a semantic one." *Pet. App.* 17a-18a. In addition, the court below found that ". . .there is no merit in the distinction drawn by the Secretary between 'prior restraint' of a form of speech and criminal sanctions for engaging in a form of speech." *Pet. App.* 18a-19a.

Since Petitioner's "prior restraint" argument adds nothing to the *Schaumburg* analysis, the review of such an argument by way of certiorari is unnecessary and such a writ should not be granted.

III. THIS COURT SHOULD NOT REVIEW A CASE FOR THE SOLE REASON THAT LOWER COURTS HAVE DIFFERED IN THE APPLICATION OF *SCHAUMBURG*, SINCE IT IS CLEAR THAT THE SPECIFIC PROVISIONS OF EACH STATUTE, AS INTERPRETED BY THE COURTS, ARE DISPOSITIVE OF THE MERITS; FURTHERMORE, EVEN IF THERE ARE DIFFERING INTERPRETATIONS

(RATHER THAN APPLICATIONS) OF *SCHAUMBURG*, NONE OF THE ISSUES LEFT UNDECIDED BY THIS COURT COULD BE SETTLED UPON REVIEW OF THIS CASE SINCE THEY ARE NOT NECESSARY TO ITS RESOLUTION.

Petitioner contends that review by this Court is necessary to correct the "...deep division as to the proper interpretation and true effect of [the *Schaumburg*] decision." *Petition* at 24. Such an argument would be well taken if in fact such a "deep division" existed. However, the various cases cited by Petitioner as support for this assertion prove only that the variety of statutes and regulatory schemes that have been dealt with by the lower courts is limitless, as it should be.

Each of the cited cases falls for or against constitutionality based not upon a national misunderstanding of *Schaumburg*, but because each court is faced with a different statutory scheme. As noted in Section II, a large part of a court's job in evaluating the validity of a statute is its interpretation of what the statute actually means. Once that is done, the case law is relatively simple to apply; the *Schaumburg* opinion is quite clear in its mandate.

Furthermore, even if there is a true division of interpretation among the state and federal courts of appeal, Respondent contends that for the reasons set forth below and in Section II, this case is an inappropriate vehicle for the refinement of *Schaumburg* by this Court.

The interpretation of the §103D waiver provision as constitutionally insufficient to distinguish the statute from *Schaumburg* would make any review of this case a mere rehearing of *Schaumburg*. The issues raised by the State would be unnecessary to the resolution of the case, and therefore, would not be addressed by this Court.

In light of the facts and circumstances of the instant case, even if there exists conflicts among the lower courts as to the meaning of *Schaumburg*, review of this case by this Court would not resolve those conflicts, and therefore, review on such a basis should not be granted.

IV. THIS COURT SHOULD NOT REVIEW THE ISSUE OF STANDING, SINCE RESPONDENT HAS SUFFERED INJURY IN FACT, AND HAS THE RIGHT TO RAISE THE CONSTITUTIONAL RIGHTS OF PARTIES NOT BEFORE THIS COURT UNDER THE APPLICABLE DECISIONS OF THIS COURT, INCLUDING *SCHAUMBURG*.

Respondent strongly disagrees with Petitioner's characterization of its standing to challenge §103D as ". . .an unthinking and unwarranted departure from traditional rules of standing. . ." *Petition* at 28. In fact, a denial of standing to challenge the statute would be a decision ". . .clearly at odds with decisions of this Court." *Id.* In support of this contention, Respondent will briefly set forth the basis of its standing to challenge §103D.

The minimum standing requirement under Article III of the Federal constitution is that there be "injury in fact"; that is, some showing that the party challenging the statute is actually injured by its operation. *Barrows* v. *Jackson*, 346 U.S. 249 (1953). In the case at bar, it was stipulated that Respondent has lost and will lose business because its clients, the Fraternal Orders of Police, are reluctant to contract with Respondent for fear of being exposed to criminal liability. This result is not surprising, since it is a crime under §103D to "pay or agree to pay," as expenses, amounts in excess of those permitted. It was also stipulated that Respondent's contracts call for such a fee.

Such an injury is clearly sufficient under Article III to establish a "case or controversy." There is clear economic injury plainly caused by the operation of the statute, and therefore Respondent meets the first test of standing.

The second test is more complicated to state, but has an equally simple resolution in this case. Although ordinarily a party cannot raise the constitutional rights of others not before the Court, it may do so under either of the two exceptions to the general rule: (1) the exception for parties challenging the facial invalidity of a statute on First Amendment grounds, and (2) the so-called *jus tertii* exception based upon the relationship between the litigant's activity and the third party rights sought to be asserted.

A full exposition of the basis of the "overbreadth" standing exception is unnecessary to the disposition of the Petition before this Court. It will suffice to point out that the overbreadth standing granted to the litigant in *Schaumburg* is equally available to the Respondent in this case, as is the analysis in support thereof.

As an alternative ground, Respondent claims standing based upon the possibility of dilution or adverse effect upon the constitutional rights of the Fraternal Orders of Police. If the methods of fundraising deemed most appropriate to the advancement of their chosen issues are closed off by the fear that they will exceed a spending limitation, then there is a real and substantial effect upon their rights that is inextricably "bound up" with the activity Respondent wishes to pursue. See *Singleton* v. *Wulff*, 428 U.S. 106, 114 (1976). In such cases, this Court allows the third party's rights to be vicariously asserted. See *Craig* v. *Boren*, 429 U.S. 190 (1976), and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1924).

Respondent has established both injury in fact, and two distinct grounds for the assertion of the constitutional rights of parties not before the Court. Respondent therefore has standing to challenge §103D, and to raise in support of that challenge the rights of the class of groups identified in *Schaumburg* as protected from overbroad regulation of fundraising expenses. This Court need not grant review of this case on the basis of a challenge to Respondent's standing.

CONCLUSION

Before this Court is the question of whether to exercise its discretionary power to further review the case at bar by the issuance of a writ of certiorari. Petitioner has raised several important questions that might have been left undecided by this Court in the *Schaumburg* opinion, and asserts that the Court should review this case to answer those questions. However, it is clear from the facts of this case, and from the opinions below, that those questions are not at all necessary to the correct disposition of this case.

Petitioner has also contested the Maryland court's interpretation of the waiver provision as insufficient to save it from overbreadth. The Secretary now asks this Court to review the authoritative construction of a state statute by the highest court of the state because it is a misinterpretation of *Schaumburg*. It is clear, however, that the application of *Schaumburg* by the court below was correct; what Petitioner is really contesting is the interpretation of the waiver power by the Maryland court. Such an issue is not a valid reason for the issuance of a writ.

Finally, Petitioner attacks Respondent's standing to challenge the Maryland statute. No basis for review will be found in this issue, since it is beyond question that Respondent meets the dual test for standing, and therefore may challenge the statute at issue.

For the reasons set forth herein, Respondent respectfully suggests to this court that the review of the instant case by the issuance of a writ of certiorari would be an unwarranted exercise of discretion, and therefore the Petition of the Secretary of State of Maryland should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

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OCTOBER TERM, 1982

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v.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

REPLY BRIEF OF PETITIONER

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

REPLY BRIEF OF PETITIONER

Petitioner, Patricia G. Holtz, Secretary of State of Maryland, pursuant to Supreme Court Rule 22.5, files this brief in response to Respondent Munson's Opposition to Petition for Writ of Certiorari. Its purpose is to correct legal and factual misstatements contained in Respondent's filing and to amplify the latter's concession that "Petitioner has raised several important questions" in her Petition for Writ of Certiorari. *See Respondent's Brief in Opposition* at 12.

ARGUMENT

THE SUBSTANTIAL IMPORTANCE OF THE ISSUES IN THIS CASE IS EVIDENCED BY THE MANY STATES WITH CHARITABLE FUND-RAISING LAWS SIMILAR TO MARYLAND'S, THE SPLIT AMONG LOWER COURTS ON THE SCOPE OF THE *SCHAUMBURG* DECISION, AND THE MARYLAND COURT'S CLEARLY UNWARRANTED EXTENSION OF THAT CASE AND REJECTION OF ITS CAREFULLY DRAWN DISTINCTIONS.

At the outset it is important to note what Munson has conceded in its Brief in Opposition. Other than pointing out the obvious fact that cases in other jurisdictions do not involve precisely identical fund raising restrictions, Respondent does not bother to distinguish or discuss the split in authority among the lower courts on the scope of this Court's decision in *Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980). It does not mention the many states with laws similar to that struck down by the Maryland Court and it concedes that the issues raised by Petitioner are important and unresolved. *See Respondent's Brief in Opposition* at 12. Munson's position comes down to the assertion that this case is "on all fours" with *Schaumburg* and that this is not the "appropriate vehicle" to resolve the important questions raised by the State of Maryland. This is simply not true.

First, the situation in *Schaumburg* is vastly different than that presented here. Munson is a professional fundraiser — a business — attempting to earn money from charities and other organizations. It is not an advocate. Although Respondent strains to squeeze his facts into the *Schaumburg* mold, the record will not permit it. Contrary to Munson's suggestion, *see Respondent's Brief in Opposition* at 2, there is not the slightest evidence that the State threatened Munson's "clients" with prosecution for exceeding the percentage limitation on fundraising. In fact, the Maryland Attorney General's office cautioned state offi-

cials to liberally administer the 25 percentage limitation of § 103D of Article 41. *See Petition for Certiorari* at 11-12.[1]

Second, *Schaumburg* involved a facial challenge to a *flat ceiling* on *all* non charity expenditures which had to be complied with *before* an advocacy group could register. It is hard to imagine a facial attack on a statute such as Maryland's, that both features an *elastic* and *generous* percentage limitation on *certain* fundraising expenses, and that does *not* involve prior restraint.[2] If ever a statutory scheme called for analysis on an "as applied" basis, it is this one.

Third, before even reaching the facial First Amendment issue in *Schaumburg*, this Court was careful to note a record of real and substantial overbreadth that is completely absent here.[3]

---

[1] The only mention of an alleged threatened prosecution appears in Munson's complaint and amended complaint where it is stated that the firm's counsel was told that the State would seek prosecution of Munson if the latter did not register as a professional fundraiser under § 103L of Article 41. This assertion, which was denied by the Secretary, was never put to the test because Munson's § 103L count was dismissed for failure to exhaust administrative remedies. See Complaint, Count One at ¶9; Amended Complaint, Count One at ¶9; Answer at ¶7; and Memorandum and Order of the Circuit Court (May 25, 1978). Neither the complaints nor the stipulation filed below say anything about the threatened prosecution of advocacy groups.

[2] Munson has conceded to this Court that § 103D does not amount to a prior restraint. *Respondent's Brief in Opposition* at 3.

[3] Munson repeatedly implies that as a result of § 103D, *all* his advocacy-oriented clients will cease doing business with the firm. *Respondent's Brief in Opposition* at 2 and 10. However, according to the record in this case, during the four years this litigation was pending in state courts, only a single chapter of the Fraternal Order of Police (FOP) claimed to be "reluctant" to contract with Munson. Neither this organization or any other chapter of the FOP ever sought or was denied an exemption from § 103D. (App. 39a).

In short, there are a number of critical differences between the registration statute struck down in *Schaumburg* and the reasonable Maryland provision at issue here. If Respondent is correct, the distinction this Court carefully drew between the flexible limitation of *National Foundation v. Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied* U.S. 1040 (1970), and the ceiling in *Schaumburg* is indeed a paper one; and all the states with elastic percentage requirements like Maryland's should scrap them.

Contrary to Munson's contentions, there are no obstacles to review by this Court of the issues pressed by Maryland. Whether the state law constitutes a prior restraint or offends the First Amendment are federal constitutional questions, not mere issues of statutory interpretation. Nor would the allegations by Respondent of unbridled and unconstitutional discretion conferred upon state officials by way of the exception mechanism of § 103D furnish an adequate basis for upholding the decision of the Maryland Court.[4] Munson's argument is in reality one bottomed on assertions of prior restraint — a theory he abandoned both in the lower court and here.

[4] This issue was not decided by the Court of Appeals.

CONCLUSION

To justify review in this case, this Court need not rely upon Respondent's concession that the issues pressed by the State are important and unresolved. The questions presented are intrinsically significant because of their impact on other States, the efficiacy of their charitable fundraising regulations, and the integrity of this Court's decisions.[5] For these reasons and those stated in the Petition for Certiorari, we ask the Court to review the August 5, 1982 judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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[5] Indeed, underlying the standing issue raised here is the unresolved question of the extent to which state courts are required to limit federal question standing in accordance with federal standards. *See* L. Tribe, *American Constitutional Law* § 3-18 (1978) (The issue "has long been the subject of confusion."). *Contrast* Tribe, *supra*, who urges no federal limits on state standing rules, *and* P. Freund, *Supreme Court and Supreme Law* 31 (1954) who contends that state courts are bound by this Court's federal question standing decisions.

No. 82-766

Office Supreme Court, U.S.
FILED
MAR 23 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF STATE OF MARYLAND,
Petitioner,

v.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. May a professional fund-raiser to whom a percentage limitation on fund-raising fees may be validly applied challenge that limitation on its face with respect to others in the absence of prior restraint or a showing of real and substantial First Amendment overbreadth?

2. Does State law imposing a criminal penalty or authorizing withdrawal of registration from a charity spending more than 25% on fund-raising costs constitute a "prior restraint" on that charity when compliance with percentage limitation is not a condition precedent for registration and a charity may be exempted from the percentage limitation requirement, even after that limitation has been exceeded?

3. Is a percentage limitation only on the fund-raising costs of charities facially unconstitutional *per se* under the First Amendment no matter how moderate, flexible or reasonably applied?

PARTIES

The parties to the proceedings in the Court of Appeals of Maryland were the Joseph H. Munson Company, Inc. and the Secretary of State of Maryland, at that time Fred L. Wineland. Mr. Wineland resigned on July 1, 1982 and was subsequently replaced by Patricia G. Holtz; the term for Ms. Holtz's interim appointment expired and she was replaced by Lorraine M. Sheehan on February 4, 1983.

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ON WRIT OF CERTIORARI TO THE
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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported as *Joseph H. Munson Co., Inc. v. Secretary of State*, 294 Md. 160, 448 A.2d 935 (1982); the text of this opinion appears in the Appendix to the Petition for a Writ of Certiorari (APC 1a).[1] The opinion and judgment of the Court of Special Appeals of Maryland reversed by the State's highest court is reported as *Joseph H. Munson Co., Inc. v. Secretary of State*, 48 Md. App. 273, 426 A.2d 985 (1981), and is also reprinted in the Appendix to the

[1] References to the Appendix to the Petition for a Writ of Certiorari are cited "APC" and references to the Joint Appendix as "A".

Petition for Writ of Certiorari (APC 23a). The opinion and order of the Circuit Court for Anne Arundel County that occasioned an appeal is unreported, but is also reprinted in the Appendix to the Petition for a Writ of Certiorari. (APC 38a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 5, 1982. The jurisdiction of this Court is premised upon 28 U.S.C. Section 1257(3) and 28 U.S.C. Section 2101(c).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ANNOTATED CODE OF MARYLAND

ARTICLE 41

§ 103D. Limitations on amount of payments for solicitation activities.

(a) A charitable organization other than a charitable salvage organization may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity. The Secretary of State shall, by rule or regulation in accordance with the "standard of accounting and fiscal reporting for voluntary health and welfare organizations" provide for the reporting of actual cost, and of allocation of expenses, of a charitable organization into those which are in connection with a fund-raising activity and those which are not. The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

The 25% limitation in this subsection shall not apply to compensation or expenses paid by a charitable organization to a professional fund-raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund-raising activity, such compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund-raising activity.

(b) For purposes of this section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drink sold or provided to the public, nor should these costs be included as fund-raising

costs; (2) the actual postage paid to the United States Postal Service and printing expense in connection with the soliciting of contributions, nor should these costs be included as fund-raising costs.

(c) Every contract or agreement between a professional fund-raiser counsel or a professional solicitor and a charitable organization shall be in writing, and a copy of it shall be filed with the Secretary of State within ten days after it is entered into and prior to any solicitations.

§ 103L. Enforcement of subtitle; penalties.

(a) A charitable organization, professional fund-raiser counsel, or professional solicitor which wilfully fails to file a registration statement, report, or other information with the Secretary of State or wilfully files such a statement, report, or other information which is materially false, or otherwise wilfully violates the requirements of this subtitle, is guilty of a misdemeanor, and, upon conviction, shall be fined not more than $5,000 or sentenced to imprisonment for not more than one year, or be both fined and imprisoned. An officer, director, partner, or trustee of a charitable organization, professional fund-raiser counsel, or professional solicitor which is organized in corporate, partnership, or other organizational form who causes the entity to commit a wilful violation of this subtitle is also guilty of a misdemeanor, and, upon conviction, is subject to the same penalties as the entity.

(b) The Secretary of State is authorized, upon complaint or upon his own motion, to investigate alleged violations of this subtitle. If he finds that a charitable organization, professional fund-raiser counsel, or professional solicitor has violated a provision of this subtitle, he may:

(1) Cancel and annul the registration of the violator;

(2) Refer the matter to the Attorney General for civil enforcement under subsection (c); and

(3) Refer the matter to the appropriate State's attorney for prosecution.

(c) Upon referral by the Secretary of State, the Attorney General may file a civil action in the Circuit Court for Anne Arundel County for an order restraining further violations of this subtitle, restraining the defendant from conducting any further fund-raising activities in Maryland, enforcing compliance with this subtitle, and such other relief as he deems appropriate. As a condition of registration, each charitable organization, professional fund-raiser counsel, and professional solicitor shall consent in writing to the jurisdiction and venue of the Circuit Court for Anne Arundel County to grant appropriate relief.

(d) The Secretary of State shall adopt rules and regulations for the administration and enforcement of this subtitle.

CODE OF MARYLAND REGULATIONS

COMAR 01.02.04.05

.05 Twenty-five Percent Limitation.

A. Calculating Fund-raising Expenses. If an organization confines its solicitation to one or more clearly delineated campaign periods, the 25-percent limitation contained in Article 41, § 103D(a), Annotated Code of Maryland, may be applied retrospectively on an annual basis or on a campaign-by-campaign basis. Under no circumstances, however, may an organization enter into an agreement to pay as expenses in connection with a fund-raising activity a total amount in excess of 25-percent of the total gross income raised or received by reason of the fund-raising activity, except as set forth in Article 41, § 103D(a) and (b), Annotated Code of Maryland, and this regulation.

B. Exceeding the 25-percent Limitation.

(1) The Secretary may permit an organization to exceed the 25-percent limitation contained in

Article 41, § 103D(a), Annotated Code of Maryland, upon a showing that it is necessary to the accomplishment of the organization's charitable purpose and that there is no other reasonable alternative.

(2) Instances in which the 25-percent limitation would effectively prevent an organization from raising contributions, include, but are not limited to, the following situations:

(a) When there are extraordinary, unusual and non-recurring circumstances which can be factually supported; and

(b) When an organization is less than 2 fiscal years old and in the developmental stage.

(3) An organization which expects to exceed or does exceed the 25-percent limitation shall file a request for a waiver with the Secretary on forms provided by him before further engaging in solicitation. The organization shall provide the Secretary with the percentage amount by which it expects to exceed or has exceeded the 25-percent limitation.

(4) If the Secretary denies a request for a waiver of the 25-percent limitation, the organization adversely affected may request a hearing pursuant to COMAR 01.02.03.

C. Disclosure of Waiver of 25-percent Limitation.

(1) As used in this regulation, the terms "gross income" and "fund-raising expenses" are limited as set forth in Article 41, § 103D(a) and (b), Annotated Code of Maryland.

(2) When the Secretary, pursuant to Article 41, § 103D(a), Annotated Code of Maryland, and this regulation, grants a waiver to an organization which expects to exceed the 25-percent limitation, the organization shall disclose to the public the percentage amount authorized by the Secretary to be used for fund-raising expenses. The organization shall print or affix this disclosure by stamp or label on each item of the goods to be sold or publications to be distributed in letters of eight-point type or larger as follows: "The percentage of gross income raised as a result of this

solicitation which may be used for fund-raising expenses may not exceed ____ percent. The Maryland Secretary of State has authorized a waiver of the statutory 25-percent limitation on fund-raising expenses."

(3) When it is not feasible to print or affix this information on each item of goods to be sold, a sign disclosing the information in the form prescribed above shall be printed in block letters at least 1 inch high and conspicuously displayed at each location where the sale of goods occurs.

(4) In the case of telephone solicitation, oral communication, or media solicitation, an organization which:

(a) Expects to exceed the 25-percent limitation shall disclose in each case of solicitation the information prescribed by § C(2), above; or

(b) Does exceed the 25-percent limitation shall disclose in each case of solicitation the information prescribed in § C(5), below.

(5) An organization which exceeds the 25-percent limitation shall include for the next year in all solicitation mailings, publications, and advertisements of any sort, a statement in letters of eight-point type or larger indicating that the limit was exceeded and disclosing the actual percentage of the total gross income raised as a result of fund-raising activities which was used for fund-raising expenses. The statement may indicate that the waiver of the 25-percent limitation on fund-raising expenses was authorized by the Secretary in accordance with the law.

STATEMENT OF THE CASE

A. *The Statute and Regulations at Issue*

The state law under review here, Article 41, Section 103D of the Annotated Code of Maryland, provides for a flexible 25% limitation on a charity's fund-raising expenses. Section 103D does not mandate that a fixed

amount or set percentage be spent by a charity on charitable purposes. Thus, a charity's administrative or other non-charitable expenses are in no way limited. The only expenditures that are in any way limited are certain amounts spent solely on fund-raising.

Moreover, while Section 103D does prohibit a charity from paying or agreeing to pay fund-raising expenses "in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity," meeting such a requirement, however, is not a condition of securing registration. There is no provision for *prior approval* of contracts between a charitable organization and a professional fund-raiser in Maryland law. A mechanism which so provided was specifically deleted from the 1976 bill which later became Section 103D. *See* Chapter 679, Laws of Maryland 1976.[2] All that remains is a requirement that such contracts be filed with the Secretary of State. Section 103D(c). The only penalties for violating Section 103D are: (1) possible cancellation of registration, Article 41, Section 103L(b); (2) possible civil suit to restrain violators from conducting additional fund-raising, Article 41, Section 103L(c); and (3) a possible criminal misdemeanor prosecution for "willfull" violations, Article 41, Section 103L(a).[3]

The Maryland law also contains major exemptions that further diminish the impact of the 25% restriction. Excluded from fund-raising costs are all costs incurred for goods, food, entertainment, or drinks sold or provided to the public and for postage and printing expenses in

[2] In response to the 1974 Governor's Report concerning abuses in charitable fund-raisers, it was first proposed that a charity's fund-raising expenses be limited to 15% of its gross income. *See* Senate Bill 287, 1975 Session, Maryland General Assembly. This bill was rejected.

[3] Authorization for a civil suit against a professional fund-raiser by the charity was deleted from the 1976 bill. *See*. Ch. 679, Laws of Maryland 1976.

connection with the solicitation. Section 103D(b). In addition, charities are free to pay and professional fund-raisers are free to charge what they want — without any limitation — for "feasibility studies" and "preliminary planning." Section 103D(a).[4]

Most importantly, the Maryland statute provides that:

> The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

These regulations illustrate the flexibility of the Maryland statute.[5] A charity can choose the applicable period during which the 25 percent limitation is in effect and can apply it retroactively on an annual basis or on a campaign-by-campaign basis. *See* COMAR 01.02.04.05A. The rules place no limit on the type of circumstances justifying relief from the percentage limitation. *See* COMAR 01.02.04.05B. Specifically identified as justifying an exemption is the case where "an organization is less than 2 fiscal years old and in the developmental stage" and "extraordinary, unusual and non-recurring circumstances." An organization can file for an exemption at any time, *including after it actually exceeds the 25 percent limitation*. COMAR 01.02.04.05B(3).

[4] Other liberal features mark Maryland's flexible percentage limitation scheme. For example, the definitions of "contribution" and "professional fund-raiser" are not all-encompassing. Article 41, Section 103A(c) and (h). And charitable salvage organizations, collecting secondhand goods are not subject to the limitation. Article 41, Section 103D(a).

[5] In describing a "trend toward allowing more flexibility in the amount spent for fund-raising," a 1977 study of the National Association of Attorneys General specifically took note of the Maryland statute. *See* NAAG, *State Regulation of Charitable Trusts and Solicitation*, (Aug. 1977) at 31.

Finally, the Maryland law is being administered in a careful fashion with attention being paid to the First Amendment rights of advocacy groups. *See* Annual Report of the Secretary of State (Exhibit A). A 1980 Opinion of the Maryland Attorney General advised the Secretary of State that the 25 percent limitation was not to be considered as an advance requirement for registration; that a charitable organization be given a hearing before any attempt is made to cancel a registration for violation of Section 103D and that the Secretary consider staying such a cancellation attempt pending judicial affirmation. 65 *Opinions of the Attorney General* 58, 61, 64 (1980). Significantly, the Attorney General advised that "the Secretary of State should not hesitate to grant waivers that are based on a responsible showing of justification, especially as regards the public-interest type organization described in the *Schaumburg* opinion." *Id.* at 65.[6] In fiscal year 1982, there were 16 requests for a waiver of the 25 percent limitation with only three denials of the waiver.[7] *Annual Report of the Secretary of State*, (Exhibit A). Waivers were granted by the Secretary approving fund-raising costs in the range of 48 percent to 85 percent. The *Annual Report of the Secretary of State* also shows that over 1,800 organizations filed with that office in fiscal year 1982. (Exhibit A)

These mitigating factors of Section 103D nevertheless do not undercut an important purpose of the statute, viz., to

[6] Although the Respondent in this case admitted overcharges contrary to Section 103D since 1978, the Secretary of State did not take legal or punitive action against it or any of its clients. Section 103D.

[7] While the Secretary's report shows three denials of the waiver, two of the organizations, Howard County Police Officers Association and Anne Arundel County Professional Firefighters Local 1563, submitted additional information and were subsequently granted waivers. Therefore, only one denial of the waiver was final. (Exhibit A)

"assure that contributions will be used to benefit the intended purpose." *See* Preamble to Chapter 679, Laws of Maryland 1976.*

B. *The Proceedings Below.*

On March 7, 1978, the Joseph H. Munson Company, Inc. ("Munson"), a firm incorporated in Indiana, but based in Florida and operating as a professional promoter providing advice to organizations desiring to raise money, filed suit against Maryland's Secretary of State in the Circuit Court for Anne Arundel County, Maryland, seeking a declaration that it was not liable to register as a professional fund-raiser under State law and that Section 103D of Article 41 of the Annotated Code of Maryland was unconstitutional as an unlawful delegation of legislative authority (A. 3). In addition, Munson prayed for injunctive relief against enforcement of these statutes. Specifically, the firm alleged that its activities in Maryland were limited to "advising its clients [various chapters of the Fraternal Order of Police] as to how to go about promoting a particular event" and that it "regularly charged" these chapters a fee in excess of 25 percent of the total gross income of the event (A. 4). Following a motion to dismiss for failure to exhaust administrative remedies, the court dismissed the claims regarding registration of professional fund-raisers but allowed the challenge to Section 103D to continue (A. 13).

The State answered (A. 18) and nothing occurred in the case for nearly two years, until an attempt was made to

* The Preamble of the 1976 Maryland statute also notes that the legislation was a result of news article involving *inter alia* the Pallotine scandal (in which millions of dollars were raised by direct mail, but little used for charitable activities) "alleging that various organizations soliciting funds from the public had excessively high administrative and other expenses, which resulted in a relatively small portion of the contributions collected being used for their intended purpose."

dismiss the suit for want of prosecution. After the suit was allowed to continue, Munson, on May 13, 1980, filed an amended complaint realleging the same factual averments, but also raising for the first time a federal constitutional claim (A. 21). The firm contended that the 25 percent limitation on fund-raising expenses contained in Section 103D "is unconstitutional and in violation of the First and Fourteenth Amendment[s] of the United States Constitution, as it violates the Plaintiff's right to free speech and assembly and unduly intrudes thereon." The State again answered (A. 27) and in an accompanying memorandum questioned Munson's standing to bring its action (A. 29). On June 16, 1980, the case was heard by the Circuit Court on the basis of a five-sentence stipulation which stated that Munson's contract with the Fraternal Order of Police (FOP) called for a fee in excess of 25 percent of the net income raised via the event; that the organization was engaged in the dissemination of information and the advocacy of causes on behalf of police officers and a single chapter of the FOP was "reluctant" to enter into a contract with Munson because of Section 103D (APC 39a). The firm offered no evidence to describe the alleged advocacy action of the FOP or to show a connection between the actual advocacy activities and Munson's dispensation of fund-raising advice or the particular events of individual chapters; or that any other chapter of the organization (allegedly being overcharged for fund-raising services since 1978) had refused Munson's services or was reluctant to engage them; or that any chapter of the FOP had attempted to seek a waiver of the Section 103D limitation or was denied a requested waiver.[9]

[9] On June 4, 1982, Munson filed with the Maryland Secretary of State an application for registration as a "professional fund-raiser counsel." Attached to this application were copies of contracts for fund-raising drives or events it has entered into with the State Lodge of the Fraternal Order of Police and the Baltimore County, Prince George's County, Anne Arundel

On July 2, 1980, the Circuit Court issued its opinion (APC 38a) upholding the challenged statute. Relying upon *National Foundation v. Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *Cert. denied* 396 U.S. 1040 (1970) and distinguishing *Village of Schaumburg v. Citizens for Better Environ.*, 444 U.S. 620 (1980), the Circuit Court held that Section 103D presented no prior restraint on protected activities and, because of the Secretary's power to grant exemptions to the 25 percent limitation, provided "a sufficiently flexible standard" to accommodate First Amendment rights (APC 46A). The court also found no invalid delegation of legislative power.[10] An appeal was taken by Munson to the Court of Special Appeals which affirmed for essentially the same reasons. *Joseph H. Munson Co., v. Secretary of State*, 48 Md. App. 273, 426 A.2d 985 (1981) (APC 23a). The appellate court agreed there was no prior restraint and that the flexible Maryland statute with its many exceptions and provisions for waiver, fit the model of the law upheld in *National Foundation*. In conclusion, the appellate court said:

> We think section 103D regulates First Amendment freedom of speech in such a way as to minimize encroachment upon individual rights while simultaneously protecting the citizenry of this State from sham and fraud. In sum, section 103D is drawn in a

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County and Montgomery County FOP lodges. Although the June 16, 1980 stipulation in the court case had previously asserted that the latter FOP lodge was "reluctant" to enter into a fund-raising agreement with the firm, the contract with the Montgomery County FOP lodge was dated June 20, 1982 — at a time when two Maryland courts had already rejected Munson's attack on the constitutionality of Section 103D. The agreement with the Montgomery County FOP specified that more than a dozen categories of expenses were to be paid from the gross receipts at the event and that Munson was to receive a fee of 50 percent of the net proceeds remaining after payment of the enumerated expenses. (Exhibit B.)

[10] No mention was made in the Circuit Court opinion of the State's contention regarding standing.

> manner calculated to protect the public interest 'without unnecessarily interfering with First Amendment freedoms.' The statute is constitutional (APC 35a).[11]

Munson petitioned the Court of Appeals of Maryland for certiorari, contending that Section 103D was fatally overbroad on its face in violation of the First Amendment, and for the first time, arguing that in light of the waiver feature of Section 103D "the discretion vested in enforcement officials as a result of the lack of standards is itself an unconstitutional infringement on First Amendment interests." The Secretary of State cross-petitioned on the standing issue. The State's highest court agreed to hear the case and reversed. First, the Court of Appeals concluded that under *Schaumburg* and *Craig v. Boren*, 429 U.S. 190, 193-197 (1976), Munson had standing to challenge the statute on its face (APC 13a). Second, without reference to the legislative history of Section 103D or its implementing regulations or the obvious record of its non-enforcement via a permit scheme, 65 *Opinions of the Attorney General* 58 (1980), the Maryland Court found an impermissible prior restraint (APC 61a-18a). Third, the Court found no difference between the Maryland law and the statute invalidated in *Schaumburg* (APC 16a-21a). In addition, the opinion stated that the waiver feature of Section 103D was "extremely narrow." (APC 20a) Thus, the Court held that Section 103D was violative of the First Amendment as overly broad and invalid on its face. A timely Petition for a Writ of Certiorari was filed with this Court on November 3, 1982, and granted on January 10, 1983, 103 S. Ct. 722 (1983).

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[11] The Court of Special Appeals declined to consider the State's objection regarding Munson's standing, concluding that the issue had not been decided below. (APC 29a)

SUMMARY OF ARGUMENT

The Court of Appeals of Maryland erroneously concluded that Munson, a professional fund-raiser, had standing to assert the rights of certain charities in challenging the flexible 25 percent limitation on fund-raising expenses contained in Article 41 Section 103D of the Maryland Code; and that on its face Section 103D violated the First Amendment Rights of charitable organizations.

APPLICABLE RULES OF STANDING

To avoid the unnecessary decision of constitutional questions and the adjudication of abstract questions, a plaintiff raising a federal question must assert his own legal rights and interests, not those of third parties. *Warth v. Seldin*, 422 U.S. 490 (1975). These principles control state court treatment of federal questions and should have governed the Maryland court, which claimed reliance on Supreme Court standing decisions and whose own third party standing rules mirror those of this Court. However, the lower court reached out to invalidate on its face and in the abstract the State's percentage limitation on fund-raising expenses and, in particular, its flexible and liberal exception procedure which no Maryland charity has ever found to be a burden.

NO *JUS TERTII* STANDING

An exception to restrictions on third party standing may be found where a substantial business relationship exists between the litigant and third parties whose constitutional rights would be otherwise diluted and impossible to assert. *Singleton v. Wulff*, 428 U.S. 106 (1976). However, this exception does not apply to this case because the mere existence of Section 103D and its generous exception mechanism does not ensure that the rights of Munson's clients will be violated; because the charities — who have suffered no detriment from Section 103D or sought a

waiver of its limitations — are capable of asserting their own rights; and because Munson laid no factual basis for the assertion of *jus tertii* standing.

NO OVERBREADTH STANDING

To prevent chill to First Amendment rights, another exception to third party standing rules arises where a litigant asserts that a statute is facially overbroad. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Nevertheless, this exception should be sparingly invoked and never employed in a case where conduct as well as speech is involved, unless the overbreadth is "real and substantial". *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). In this case, the exception procedure set forth in Section 103D and the Regulations of the Petitioner obviate any alleged chill to the First Amendment rights of charities. The absence of any facts showing the alleged advocacy activities of Munson's clients, the source of funding for such advocacy, the connection between Munson and such activities, the availability of reasonably priced alternatives to Respondent's overcharges, the effect on Munson's clients of Section 103D and its exception mechanism and the threat of prosecution to either, all lead to the conclusion that no real and substantial overbreadth has been shown. This evidentiary gap and the lack of any prior restraint in the Maryland statute distinguish the standing issue here from that resolved in *Village of Schaumburg v. Citizens for a Better Environ.*, 444 U.S. 620 (1980).

NO BURDEN ON FIRST AMENDMENT RIGHTS

Percentage limitations on a charity's fund-raising expenses are not *per se* invalid. *Larson v. Valente*, 102 S. Ct. 1673 (1982); *Village of Schaumburg v. Citizens for a Better Environ.*, 444 U.S. 620, 635-36 (1980); *National Foundation v. City of Fort Worth*, 415 F.2d 41 (1969), *cert. denied* 396 U.S. 1040 (1970). Only direct and substantial burdens on a charity's First Amendment rights must be justified by

sufficiently strong state interests. Maryland's flexible 25 percent limitation on charitable fund-raising expenses, with its many exemptions, its absence of prior restraint, its generously-administered exception procedure and its lenient treatment of door-to-door solicitation, does not impose a direct and substantial burden on a charity's First Amendment rights. Thus, the Maryland scheme is clearly distinguishable from that struck down in *Schaumburg*.

IMPORTANT INTERESTS SERVED BY § 103D

The Maryland statute serves a vital state interest in protecting the public from fraud by charitable solicitors and, in line with contributors' expectations, insuring that funds solicited from the public for one purpose will not be diverted for other purposes. Unlike the ordinance invalidated in *Schaumburg*, the Maryland statute is a comprehensive law less burdensome than other measures whose purposes are not served merely in a peripheral manner. In addition, Maryland's percentage limitations scheme also protects the charities themselves from being overcharged by unscrupulous professional fund-raisers.

ARGUMENT

I.

A PROFESSIONAL FUND-RAISER, SUCH AS MUNSON, LACKS STANDING TO BRING A FACIAL CHALLENGE TO MARYLAND'S FLEXIBLE LIMITATION ON FUND-RAISING COSTS AND TO ASSERT THE ALLEGED FIRST AMENDMENT RIGHTS OF CHARITIES.

Munson is neither a charity nor an advocate of issues meriting First Amendment protection. Respondent is a non-resident business — a professional fund-raiser — attempting to earn money from Maryland charities and other organizations. As to it, the percentage limitation contained in Section 103D of Article 41 of the Maryland Code is mere economic regulation that might control the fees the firm charges. Clearly, if Munson were simply

asserting its own rights, its facial First Amendment challenge would have to fail. It must seek to assert alleged First Amendment rights of charities to have even the hope of a meritorious claim.

The Court of Appeals of Maryland rejected Petitioner's attack on Munson's standing and held as a matter of federal law that the firm could assert the First Amendment rights of charities on two independent theories: (1) Section 103D was directed at persons with whom Munson had a business or professional relationship and impaired that relationship; and (2) Section 103D could be challenged on its face as substantially abridging the First Amendment rights of charities. (APC 11a-13a). To reach these conclusions, the Maryland court relied on *Village of Schaumburg v. Citizens for Better Environ.*, 444 U.S. 620 (1980) and *Craig v. Boren*, 429 U.S. 190 (1976), as well as other decisions of this Court. (APC 12a). The State contends that these cases do not support Munson's right to assert the claimed First Amendment rights of its charity-clients and that to adopt the views of the lower court in light of the record in this case would substantially erode both the standards and the rationale set forth in this Court's decisions on third party standing.[12]

[12] Petitioner does not here press the argument that Munson has not shown "injury in fact," *Singleton v. Wulff*, 428 U.S. 106, 112 (1976), even though the nature of Respondent's injury for purposes of a facial attack on the statute is somewhat indirect and conjectural. See *Warth v. Seldin*, 422 U.S. 490, 504-505 (1975). The mere existence of § 103D does not automatically result in economic loss for a professional fund-raiser desiring to charge fees in excess of 25 percent of gross income. A charity could request and obtain an exception to exceed the limitation. In addition, there is little, if any, justification for Munson's assertion that his clients were reluctant to contract with the firm. Munson had been contracting for fees in excess of 25 percent during the entire four and one-half year period this litigation was pending in the Maryland courts. See page 12, *supra*. In fact, the very FOP chapter whose alleged reluctance

A plaintiff raising a federal question must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Without such prudential limitations, "courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Id.* at 501. Moreover, the holders of those rights may "not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not," *Singleton v. Wulff*, 428 U.S. 106, 114 (1976), and, in any event, the "third parties themselves usually will be the best proponents of their own rights." *Id.*

This case points up the necessity for these wise principles. After hearing the argument of a professional fundraiser, the Maryland court suggested that the exemption feature of Section 103D on its face conferred too much discretion on State officials yet was too "narrow" to preserve the First Amendment rights of charities. (ACP 20a). However, a charity, which itself could apply for an exception from the percentage limitation, would be in the best position to know and to litigate whether it needed

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to deal with Munson the Court of Appeals of Maryland highlighted in its August 5, 1982 opinion (APC 11a), had contracted with Munson at an excessive fee six months previously. See N. 9, *supra*, and Exhibit B. A charity's ability to obtain an exception to the 25 percent limitation and the above record of nonenforcement of the statute against Munson undercut its assertion that it faced a genuine threat of prosecution. The State denied it had ever made such a threat (A. 28) and Munson never offered any evidence on the point. However, because *in a given case* Munson could *possibly* be subject to the penalties of § 103L and because Munson would face a *possible* economic loss if an overcharged charity were denied an exception, Petitioner does not make an issue of "injury in fact" standing.

more protection from the Secretary than the fund-raiser or whether it was necessary to assert its First Amendment rights in the first place. For example, in 1980-82, five lodges of the Fraternal Order of Police requested exemptions ranging from 65 percent to 83 percent; *all* were granted. See Exhibit A. If Munson's clients — other FOP lodges — had bothered to apply for an exemption, they might not have needed Respondent's litigation.

It is also clear that state courts, just like federal courts, are bound to follow these prudential standing rules when deciding federal questions. Although some maintain that these limitations were developed "by the Supreme Court in its supervisory capacity over the federal judiciary," *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130, 137 (D.C., *cert denied* 438 U.S. 1036 (1977)) and Professor Tribe has urged no federal limits on State standing rules, L. Tribe, *American Constitutional Law*, § 3-18 (1978),[13] decisions of this Court on third party standing have drawn no distinction between State and federal courts. See *e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Barrows v. Jackson*, U.S. 249 (1953) *reh'g denied*, 346 U.S. 841 (1953). This Court has raised third party standing issues not even addressed by the State courts whose judgments were under review. *See McGowan v. Maryland*, 366 U.S. 420 (1961) and *Tileston v. Ullman*, 318 U.S. 44 (1943). And just two years ago, this Court held that a State court erred in permitting an immature and unemancipated girl to challenge the constitutionality of a statute requiring parental notification of the child's abortion, as applied to girls who are mature and emancipated. *H. L. v. Matheson*, 450 U.S. 398 (1981).

[13] But see, *Supreme Court and Supreme Law* (E. Cahn Ed.) 35 (1954).

There are additional cogent reasons for requiring the Maryland court in this case to comply with federal standing rules. First, the Court of Appeals of Maryland concluded that standing existed *solely* on the basis of its reading of Supreme Court decisions. It "felt compelled by what it understood to be federal constitutional considerations" to apply the standing rules the way it did. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). It was not carving out a new State rule on third party standing. In addition, even when adjudicating in their own sphere, Maryland courts apply the very same restrictive rules on third party standing articulated by this Court. See e.g. *Clark v. State*, 284 Md. 260, 264-5, 396 A.2d 243 *cert denied*, 444 U.S. 858 (1979); *Brown v. State*, 177 Md. 321, 9 A.2d 209 (1939); *In re William G.*, 52 Md. App. 131, 447 A.2d 493 (1982); Rees, *State Constitutional Law for Maryland Lawyers: Judicial Relief for Violations of Rights*, 10 U. Balto. L. Rev. 102, 119 (1980). For all of these reasons, this Court should not hesitate to apply its third party standing rules to this case.

A.

The Business Relationship Between Munson and Its Clients Does Not Warrant Liberalized Standing In This Case.

One exception to the rule that a person may not challenge the constitutionality of a statute as applied to third parties may arise when a litigant claims that a single application of a law both injures him and others [hereinafter referred to as *jus tertii* standing]. See Note: *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423, 424 (1974).

Where *jus tertii* standing is alleged, this Court has generally focused on three factual elements to determine whether such standing should be accorded: (1) the presence of some substantial relationship between the litigant

and third parties; (2) the impossibility of the third parties asserting their own constitutional rights; and (3) the need to avoid a dilution of third party rights that would result were the assertion of *jus tertii* not permitted. *Singleton v. Wulff*, 428 U.S. 106, 114-116 (1976); Note: *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423, 425 (1974). Whether these factors are considered individually or together, they do not support Munson's standing to assert the rights of charities.

It is true that Munson has a business relationship with certain groups deemed charities under Maryland law, see Md. Code, Art. 41, § 103A(b) and that a major thrust of Section 103D is aimed at the charities themselves. However, the mere existence of Section 103D does not "ensure" that the rights of Munson's clients will be violated. See *Craig v. Boren*, 429 U.S. 190, 195 (1976).[14] Here, the charities could seek and obtain an exception from the 25 percent limitation, thereby obviating any possible impact on their First Amendment rights or any penalties under the statute. The constitutional rights of the charities are not so inextricably bound up with Munson's activities that they will be automatically diluted if the firm's facial challenge to Section 103D fails. See *Singleton v. Wulff*, *supra*, 428 U.S. at 114-115.

Even if the relationship between Munson and its clients were extremely close, "the reasons for requiring persons to assert their own rights will generally apply" unless the charities lack the ability to assert their own rights. *Id.* That is clearly not the case here. There is no reason to believe that the organizations themselves, which have neither suffered detriment from Section 103D nor sought a waiver of its provisions, will have their rights diluted or

[14] In *Craig v. Boren*, *supra*, the punishment of vendors for selling 3.2% beer to underaged males guaranteed that the latters' equal protection rights would be denied.

will be precluded from challenging the statute should the need ever arise.

Finally, *jus tertii* standing requires *factual* predicates (*Singleton v. Wulff, supra*, 428 U.S. at 115-116) not present in this facial challenge to the Maryland statute. For example, there is no factual connection between Munson's services and the advocacy interests of its clients or any demonstration that the organizations will not be able to obtain the same services from others at a fee permitted under Section 103D.

For these reasons, the lower court erred when it held Munson entitled to *jus tertii* standing.

B.

THE FIRST AMENDMENT OVERBREADTH DOCTRINE DOES NOT CONFER STANDING ON MUNSON TO ASSERT THE RIGHTS OF ITS CLEINTS.

In certain First Amendment cases, a facial challenge to a statute on behalf of third parties may be permitted by one whose conduct could be constitutionally proscribed. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The important purpose served by such a rule is to protect against the "chill" to the First Amendment right of third parties. *Craig v. Boren, supra*, 429 U.S. at 195 n.4.

Nevertheless, in *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), this Court said that liberalized standing in First Amendment overbreadth cases is "strong medicine" and has been employed "sparingly and only as a last resort." And in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975), it was said that when considering a facial challenge, "it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." It is for this reason that this Court has said that in cases like the

present one, where conduct and not merely speech is involved, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma, supra,* 413 U.S. at 615.[15]

The State contends that in light of the record in this case no "substantial" First Amendment overbreadth has been shown to exist as a result of the mere existence of Section 103D.

First, the flexible percentage limitation in Maryland's law could not on its face be said to "chill" the First Amendment rights of charities. They can quite easily apply for an exception to the percentage limitation and probably obtain one, for such exceptions have been freely granted. See Exhibit A.

Second, the sparse record in this case does not identify any of the alleged "advocacy" activities of Munson's clients,[16] whether they were funded by charity events or the dues paid by FOP members,[17] whether Munson's services had anything to do with the alleged advocacy

[15] Even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if there are "a substantial number of situations to which it might be validly applied." *Parker v. Levy,* 417 U.S. 733, 760 (1974).

[16] It is by no means clear that the *principal* activity of Munson's clients is the engaging in First Amendment protected advocacy. A Florida court recently held that FOP chapters like those groups that were Munson's clients did not engage in substantial First Amendment activities. See *Fraternal Order of Police v. Department of State,* 392 So. 2d 1296, 1301 (Fla. 1980) ("The trial court also concluded that appellants' rights of free speech were not violated because the primary activities of the organizations regulated by the statute did not involve activities protected by the first amendment.")

[17] Bona fide membership dues do not constitute "contributions" under the State's regulatory scheme. See Md. Code 41, § 103A(c).

activities, or whether chapters of the FOP could conveniently obtain such services elsewhere at a 25 percent fee. What is clear is that neither Munson or its clients was threatened with prosecution, that no client was deterred from contracting with Munson for a fee in excess of that specified in Section 103D, that Munson's clients never bothered to seek an exception from the percentage limitation and that exceptions were freely granted by the State. Clearly, Munson has failed to show the real and substantial overbreadth necessary to assert this facial challenge on behalf of his clients.

This is in marked contrast to the record in *Village of Schaumburg v. Citizens for a Better Environ., supra.* The *Schaumburg* ordinance was challenged by an advocacy group that had established a relationship between its advocacy and its fund-raising and that was effectively put out of business by an inflexible ceiling on all non-charitable expenditures. *Id.* at 626.

Moreover, *Schaumburg* quite properly reflected a desire to accord liberalized standing where protected speech or conduct fell victim to the power of the censor. *See Thornhill v. Alabama,* 310 U.S. 88, 97 (1940) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of expression.") However, "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner." *Broadrick v. Oklahoma, supra,* at 614-15. **The Maryland statute and implementing regulations which allow a group to obtain a waiver of the 25 percent fund-raising limitation ever *after* that limit has been exceeded, COMAR 01.02.04.05B(3), clearly do not reveal the hand of the censor.**

For these reasons, the State submits that the Maryland Court erred when it concluded that Munson had standing to assert the alleged First Amendment rights of charities.

II.

A PERCENTAGE LIMITATION ON FUND-RAISING COSTS OF CHARITIES, WHICH INVOLVES NO PRIOR RESTRAINT AND IS BOTH FLEXIBLE AND MODERATE DOES NOT VIOLATE THE FIRST AMENDMENT.

The court below held Maryland's 25 percent limitation on a charity's fund-raising expenses — a limitation which is not only modest but also flexible — "invalid under the First Amendment of the United States Constitution." 448 A.2d at 947. To reach this holding the Maryland court created a *per se* rule that would effectively invalidate any percentage limitation in a charitable solicitation law. Such a rule is unsanctioned. This Court has never held that such percentage limitations are *per se* or intrinsically invalid. Indeed, in *Schaumburg*, the Court indicated to the contrary by distinguishing the absolute and unrealistic ceiling on a charity's operations which it struck down in that case, from the flexible percentage ceiling on solicitation expenses upheld in *National Foundation v. City of Fort Worth, supra*. And more recently in *Larson v. Valente, supra*, the Court again noted that evenhanded state regulation of charitable solicitation, including a provision for withdrawing the registration of an organization spending "an unreasonable amount" for management, general and fund-raising costs, was not "intrinsically impermissible." ___ U.S. at ___, 102 S. Ct. 1688.[18]

[18] Undoubtedly, it is because of this implicit approval of percentage limitations, and because of the simplicity and ease of administration afforded by such limitations, that many states

Rather than holding percentage limitations *per se* invalid, this Court has directed that each such regulation be carefully examined to determine if it regulates "solicitation in such a manner as not unduly to intrude upon the rights of free speech." *Village of Schaumburg v. Citizens for Better Environ.*, 444 U.S. 633. Further, the Court has specifically outlined the method for making this determination. First, the amount of the burden imposed on the protected activity by the challenged regulation must be ascertained. When the regulation imposes no substantial burden, no further constitutional analysis is necessary; the regulation must be sustained. If, but only if, the regulation imposes a "direct and substantial" burden on protected activity, it must then be determined what interest the regulation serves. *Id.* at 636. If it serves a "sufficiently strong interest" then it still must "be sustained." *Id.* at 636.

This sort of constitutional analysis, that is, examining first the character of the burden and then, only if that burden is excessive or severe, requiring its justification, is one which this Court has applied repeatedly in First Amendment cases. See *e.g. Clements v. Fashing*, ___ U.S. ___, 102 S. Ct. 2836, 2848 (1982) *reh'g denied*, 103 S. Ct.

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have employed them to protect the contributing public and charitable beneficiaries from fraud and the charities themselves from the unscrupulous practices of professional fund raisers. In fact, model state legislation to regulate charitable organizations proposed by thirteen national health charities, *suggests* a reasonable percentage limitation on fees paid professional fund raisers. See National Health Council, *Model for State Legislation Regulating Charitable Organizations* (1970). Moreover, twenty-one (21) states have established percentage limitations of varying degrees of flexibility and severity on the amounts a charity may pay to professional fund raisers or on those sums paid for solicitation and administration costs. See Petition for Certiorari at fn 8. Many states impose more difficult requirements than that contained in the Maryland statute. See, *e.g.* Mass. Gen. Laws Ann. Ch. 68, § 21; N.H. Rev. Stat. Ann. § 320.20; Okla. Stat., Tit. 18, § 5523.

20 ("burden" on First Amendment interests so "insignificant" that statute must be upheld; constitutional limitations arise "only . . . if the challenged provision significantly impairs interests protected by the First Amendment"); *Storer v. Brown*, 415 U.S. 724, 726, 738 (1974); *cf. Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("[N]ot every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review"). In *Schaumburg*, the application of this analysis led to the invalidation of the challenged ordinance. However, this was so only because: (1) the burden caused by the ordinance was found to be "direct and substantial," *and* (2) the interests justifying the ordinance, although recognized as legitimate, were held not to be "sufficiently strong." Here, in contrast, this analysis requires that the challenged regulation be sustained on both counts.[19] The Maryland law imposes no direct or substantial burden on protected activity. And, secondly, in any event, it must be sustained because it furthers strong, indeed vital, State interests.

A.

Section 103D Imposes No Direct Or Substantial Burden On Protected Activity

The very limited, moderate nature of the Maryland statute at issue here is perhaps most easily seen by comparing it with the statute condemned in *Schaumburg*.

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[19] Of course, as applied to Respondent, not itself a charity, but an out-of-state professional fund raiser in the *business* of providing advice to organizations desiring to raise money, no examination of burden or justification is necessary. For this Court has long recognized that "states have power to legislate against what are found to be injurious practices in their *internal commercial and business* so long as their laws do not run afoot of some specific federal constitutional prohibition." See *e.g., North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*,

As the Respondent concedes, Section 103D imposes no prior restraint on protected activities. Brief of Respondent in Opposition to Petition for Writ of Certiorari at 3.[20] While the *Schaumburg* ordinance required every charitable organization soliciting funds door-to-door to apply for a permit *"prior* to such solicitation" *id.* at 829, the Maryland statute requires no permit, while requiring door-to-door solicitors to register as other charities do, it does not single out door-to-door solicitors and impose special burdens on any of them. Moreover, compliance with Section 103D is not a requirement for registration. *Compare Schaumburg Village Code* Section 22-20 which provided that a charity *when* applying for a permit must demonstrate "satisfactory proof" of compliance with the 75-percent requirment including "a certified audit of the last full year of operations, indicating the distribution of funds collected by the organization, or such other comparable evidence as may demonstrate the fact that at least seventy-five percent of the funds collected are utilized directly and solely for the charitable purpose of the organization." 444 U.S. at 684 n. 4.

Maryland's Secretary of State has not only never administered Section 103D as a condition precedent to registration but rather she has been specifically advised not to do so. 65 *Opinions of the Attorney General* 58, 61, 64 (1980). Indeed, the regulations of the Secretary permit a

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(Douglas, J.) 414 U.S. 156, 165 (requiring application for permit to operate a pharmacy to be a registered pharmacist well within a state's authority to legislate against what it found to be injurious practices in its business affairs); *Ferguson v. Skrupa*, 372 U.S. 726, 730, (statute requiring one engaging in business of debt collecting to be a lawyer similarly upheld).

[20] Although the trial court and Maryland's intermediate appellate court so held, *Munson v. Secretary of State*, 48 Md. App. 273, 426 A.2d 985 (1981), the Maryland Court of Appeals, ignoring the features of § 103D described in text, erroneously concluded that it did constitute a prior restraint. 448 A.2d at 944-45.

person to apply for an exemption from the 25 percent limitation *even after Section 103D has been violated.* Because Section 103D is not a prior restraint it does not come to this Court "bearing the heavy presumption against its constitutional validity," *Southeastern Promotions Ltd. v. Conrad,* 420 U.S. 546, 558 (1975) that any prior restraint — including that in *Schaumburg* — has:

> "The presumption against *prior* restraints is *heavier* — and the degree of protection broader than that on limits on expression imposed by criminal penalties." *Id.*

For this reason alone, whatever the burden § 103D imposes on protected activity it is both far less direct and far less substantial than that imposed by the *Schaumburg* ordinance.

However, this is not the only respect in which the "burden" imposed by Maryland law is far less than that of the *Schaumburg* ordinance. The *Schaumburg* ordinance provided not only that a permit is required prior to any door-to-door charitable solicitation, but also that "a license *must* be denied to anyone 'who is not found to be a person of good character and reputation,'" (emphasis added) 444 U.S. at 622 and could be revoked if the village manager finds the solicitor "ceases to possess good character," 444 U.S. at 622. The Maryland statute does not condition registration on a subjective determination of "moral character" or allow loss of registration because of a judgment as to "moral character."

Moreover, Section 103D, unlike the *Schaumburg* ordinance, restricts only fund-raising expenses *not* all non-charity related expenditures. In fact, in *Schaumburg*, the charity in question spent less than 25 percent of its income on fund-raising (but considerably more on administrative costs) and would not have encountered a problem under Maryland law. 444 U.S. at 626. Indeed, because such a

large amount of a charity's costs are often non-fund-raising administrative expenses, Maryland's statute is less burdensome than that implicitly approved by this Court in *Larson v. Valente, supra* (the regulation in *Valente* contained a 30 percent limitation on *"management, general and* fund-raising costs," as compared with Maryland's 25 percent limitation only on fund-raising costs.) In addition, Section 103D contains significant exemptions that further mitigate the effect of the percentage limitation. See page, 8 *supra*.

While the *Schaumburg* ordinance specified no circumstances or conditions under which the percentage limitation could be waived, Section 103D clearly does. In fact, it constitutes precisely the kind of *flexible* limitation reviewed by this Court in *National Foundation v. Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied* 396 U.S. 1040 (1970) and endorsed in *Schaumburg:*

> "Unlike the ordinance upheld in *National Foundation v. Fort Worth*, 415 F.2d 41 (CA 5 1969), *cert. denied*, 396 U.S. 1040, 90 S. Ct. 688, 24 L. Ed. 2d 684 (1970), the [Schaumburg] village ordinance has no provision permitting an organization unable to comply with the 75-percent requirement to obtain a permit by demonstrating that its solicitation costs are nevertheless reasonable. Moreover, because compliance with the 75-percent requirement depends on organizations' receipts and expenses during the previous year, there appears to be no way an organization can alter its spending patterns to comply with the ordinance in the short run. Thus, the village ordinance effectively bars all in-person solicitation by organizations who spent more than one-quarter of their receipts in the previous year on salaries and administrative expenses." **444 U.S. at 636 n. 9.**

Thus, the Court found the *Schaumburg* ordinance lacked necessary flexibility in two respects. First, it did not provide an organization unable to meet the percentage limitation with an opportunity to demonstrate its solicita-

the *Schaumburg* 75 percent requirement was always based upon an organization's previous year receipts and expenditures, the organization could not alter its "spending patterns to comply with the ordinance in the short run." *Id.*

The Maryland statute provides both aspects of the flexibility so lacking in the *Schaumburg* ordinance. First, it specifically directs the Secretary of State to:

> ". . . issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions." § 103D(a).

Pursuant to this directive, the Secretary of State has issued such regulations, providing that the percentage limitation may be waived "upon a showing that it [the exemption] is necessary to the accomplishment of the organization's charitable purpose and that there is no other reasonable alternative." COMAR 01.02.04.05 B (1). Accordingly, an organization is provided with precisely the opportunity to demonstrate its solicitation costs are reasonable that was missing in the *Schaumburg* ordinance.[21] Moreover, a charity can choose the period in which the percentage limitation is in effect and apply it retrospectively on an "annual basis *or* on a campaign-by-campaign basis." COMAR 01.02.04.05A. (Emphasis added) In this way Maryland law affords the charity an opportunity to "alter" its "spending patterns," and thus provides the other important flexible feature found absent in *Schaumburg*.

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[21] This elasticity also seems to be lacking in the Minnesota statute implicitly *approved* by the Court in *Larson v. Valente*, 102 S. Ct. at 1685 and 1688.

The Respondent, in the court below, argued that the Maryland law permitted only a very narrow waiver of the 25 percent limitation. In fact, we submit the regulations provide no limit on the circumstances justifying waiver and have been employed by the Secretary in an extremely liberal manner, with special care shown for the rights of advocacy groups. See 65 *Opinions of the Attorney General* 58 (1980). More than 90 percent of the requested waivers have been granted. *Annual Report of the Secretary of State* (Exhibit A). Fifteen waivers, allowing fund-raising costs averaging more than 75 percent, have been permitted. *Id.* In fact only one waiver has been denied and that organization failed to supply the additional information requested by the Secretary. *Id.; infra* n. 7. Waivers have been permitted for a variety of reasons including an organization's statement that it is incapable of effectively conducting a fund-raising campaign, lacks fund-raising experience or time, had been unsuccessful in past fund-raising of organization or wishes to establish a building fund. *Id.*

Indeed the flexibility provided by Section 103D — a flexibility which experience demonstrates has been employed to waive the 25 percent limitation on fund-raising expenses whenever necessary — makes the challenged regulation far less burdensome than a comprehensive[22] disclosure requirment would be. This Court in *Schaumburg* suggested that disclosure would "assist in preventing fraud" 444 U.S. at 638; however, in order to effectively do this, a disclosure statute would clearly have to be both very comprehensive and readily available to the public. This Court has "long recognized" that such comprehensive disclosure requirements, while they may be justified,

[22] Maryland law requires *limited* disclosure if a charity is granted a waiver of the limitation on "fund-raising" activities. In such cases, the charity must disclose to the public the percentage of gross income authorized by the Secretary of State to be used on "fund-raising" expenses. COMAR 01.02.04.05C(2).

constitute "significant encroachments of First Amendment rights." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *Grason v. Florida Legislative Committee*, 372 U.S. 539, 546 (1963); *Bates v. Little Rock*, 361 U.S. 516, 80 S. Ct. 412 (1960); *NAACP v. Alabama*, 357 U.S. 449, 463 (1958). See also *Brown v. Socialist Workers '74 Campaign Comm*, ___ U.S. ___, 103 S. Ct. 416 (1982). Comparison of Section 103D with the statutes compelling massive disclosure which have been upheld by this Court, see *e.g., Buckley v. Valeo*, 424 U.S. at 84; *California Bankers Ass'n. v. Shultz*, 416 U.S. 21, 94 S. Ct. 1494 (1974), compels the conclusion that the comparative burden of Section 103D is miniscule.

In summary, Maryland's moderate flexible percentage limitation, which involves no prior restraint, constitutes far less burden than the statute condemned in *Schaumburg* or, indeed, even an effective disclosure requirement. Accordingly, it should be sustained.

B.

SECTION 103D FURTHERS VITAL STATE INTERESTS

The justification, for whatever burden Maryland's moderate, flexible percentage ceiling on solicitation expenses imposes is obvious and demonstable. In fact, the *Schaumburg* Court specifically recognized that a governmental body has "indeed, substantial" interests in protecting the public from fraud by charitable solicitors. 444 U.S. at 836. See also *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981) ("the State has a significant interest in protecting its fairgoers from fraudulent or deceptive solicitation practices" which "is substantially furthered by a Rule that restricts sales and solicitation activities to fixed booth locations, where the State will have the greatest opportunity to police and prevent possible deceptive practices. . . .") (Brennan, J. with whom Marshall, J. and Stevens, J. join) (concurring in part and dissenting in part). This is hardly surprising

since it is well established that a reasonable regulation of charitable organizations is well within a government's police power:

> "Without doubt, a state may protect its citizens from fraudulent solicitations by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity, his authority to act for the cause which he reports to represent. The state is likewise due to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort and convenience." *Cantwell v. Connecticut,* 310 U.S. 296, 306 (1940).

Everyone recognizes that charities have some program managemant and fund-raising expenses, however, contributions are made to charitable organizations primarily to support the organization's worthy activities and purposes. Accordingly, the state clearly has a strong interest in ensuring that funds solicited from the public for one purpose will not be diverted for other purposes. Thus, in line with contributors' expectations that their contributions will go primarily to the charitable purpose, these fund-raising costs should be moderate.[23] Section 103D's moderate flexible limitation on fund-raising expenses assures this, protecting donors and donees as well as promoting the public's perception of integrity and efficiency with which charitable funds are raised.

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[23] It is worth noting that two national organizations representing charities have, themselves, suggested percentage limitations on fund-raising expenses. The National Information Bureau suggests that at least 70% of all available contributed funds should be spent for *program activities*, that is, only 30% may be spent for fund-raising, *NIB Standards in Philanthropy* (1982), the Philantropic Advisory Service, Counsel of the Better Business Bureau, suggests that no more than 35% of total fund-raising expenses should be allocated to fund-raising. The Council of Better Business Bureaus' *Standards For Charitable Solicitations* (1982).

The only reason the *Schaumburg* Court found that this "substantial" governmental interest was unable to support even a far more burdensome regulation than that at issue here, was because it found that interest was "only peripherally promoted" by the ordinance and "could be sufficiently served by measures less destructive of First Amendment interests." 444 U.S. at 636. In the case at hand, as demonstrated above, the challenged regulation is clearly less "destructive" or burdensome on First Amendment rights. Moreover, and just as significantly, it promotes the substantial interests in a comprehensive rather than "peripheral" manner.

Although the *Schaumburg* ordinance burdened door-to-door solicitators with an inflexible prior restraint, requiring them to obtain a permit prior to soliciting, a permit which would not be issued unless the organization spent at least 75 percent of its total gross income on charitable purposes, it did not in any way even attempt to regulate any other sort of charitable solicitors. In contrast, the Maryland statute, while imposing no prior restraint, nor inflexible limitation on non-charitable expenses, does regulate all charitable fund-raising, *not just* door-to-door solicitors. Thus, on the one hand, Maryland's law does not attempt to single out for heavy regulation possibly speech-laden door-to-door solicitation, which this Court has recognized as the "most effective way of bringing [a matter] to the notice of individuals," *Schneider v. State*, 308 U.S. 147, 164 (1939), and "essential to the poorly financed causes of little people." *Martin v. Struthers*, 319 U.S. 141, 146 (1943). On the other hand, the statute challenged here is neutral and non-discriminatory and does reach all possible charity frauds.

This is significant because the need for state regulation of fund-raising activities has increased in the last few years because of two factors which have nothing to do with whether or not the charity is engaged in door-to-door

solicitation. The most important of these is the dramatic rise in the sums of money collected by charities from the public together with the emergence of charity rackets which result in the diversion of huge sums of money.[24] In addition, fund-raising which had been largely unpaid volunteer activity in the past has become one of this country's largest businesses, carried on by professional fund-raisers paid with a percentage of the funds collected.[25] Contracts between charitable organizations and charitable fund-raisers are thus not merely bilateral, rather they establish a triangular relationship with the public as a third party whose interests must be protected. While the *Schaumburg* ordinance did not even attempt to regulate the majority of charitable fund-raisers, and so only peripherally promoted the state's interest, Section 103D regulates all, in a moderate flexible manner, and so thoroughly, but carefully, furthers the state's strong interests in preventing fraud by charitable organizations.

Moreover, Maryland's flexible percentage limitations on solicitation expenses serves another interest not even asserted in *Schaumburg*. That is, it protects charities themselves from unscrupulous professional fund-raisers. Nothing is more corrosive of public confidence in charitable *giving* and thus more harmful to the charities themselves, than fund-raising schemes where for-profit

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[24] In 1981 a record $53.6 billion in charitable contributions was made with individuals contributing $44.5 billion or 83% of the total. According to statistics published by the National Information Bureau, contributor's dollars (not counting gifts to religion) had a $28.7 billion impact on our society in 1981.

[25] Nationally it was estimated several years ago that at least one percent of the billions contributed annually ends up in the pockets of fraudulent fund-raisers. *See* Note, *Charitable Solicitation Acts. An Attempt to Curb Charity Cheats*, 16 DePaul L. Rev. 472 (1967).

solicitors receive the bulk of charitable donations.[*] The lure of no-risk percentage fund-raising can easily induce a charity to sell its most valuable asset — its good name and its charitable appeal — to a professional solicitor without making a reasonable financial decision. To the charity, this is new found money without any effort on the part of the charity or risk. The conduct of trustees and directors of charitable organizations is not subject to the traditional profit and loss constraints of the market place or the scrutiny of shareholders and investors. Charitable solicitations present special opportunities for abuse. Most importantly, the direct and ultimate beneficiaries of charities — the poor, the disadvantaged, the handicapped and the general public — often are incapable of protecting their own interests. Maryland's flexible moderate limitation solely on fund-raising expenses is designed to meet the problem posed by unprincipled unscrupulous charity promoters while not unduly burdening the charity itself.

In summary, the challenged statute furthers what this Court in *Schaumburg* recognized as "substantial" state interests — the protection of the public from fraud by charities. Moreover, rather than only "peripherally" serving those interests, as the *Schaumburg* ordinance did, it serves them in a comprehensive manner. Section 103D is clearly aimed at the non-speech elements of charitable solicitation and is being administered in a neutral, non-censorial manner with special regard for the few charities that advocate issues. And, it is significantly less

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[*] There is some evidence that the unscrupulous practices of fund-raisers fall heavy on law enforcement organizations such as the charities whose rights are purportedly asserted in this case. For example, a court in Florida (where Munson is based) held that a state legislature could rationally conclude that abuse by solicitors collecting funds for law-enforcement organizations was greater than from solicitors for other organizations. *Fraternal Order of Police v. Dept. of State*, 392 So. 2d 1296 (Fla. 1980).

burdensome than other types of charitable regulation.[27] Furthermore, Maryland law serves an additional interest, not reached by the *Schaumburg* ordinance, *i.e.* it protects charities themselves from exhorbitant fees from professional fund-raisers. Since the Maryland statute furthers substantial state interests in a comprehensive, rather than peripheral matter, without directly or substantially burdening protected activity it should be upheld.

[27] The flexible percentage limitation contained in Section 103D is not as stringent as an across-the-board disclosure requirement. See page 33, *supra*. Nor is it as burdensome as the requirements of prior approval of fund-raising contracts, which provision was striken from the original bill that became Section 103D. Finally, a "flexible" limitation such as Section 103D, to which an exception may be sought even after the 25% ceiling has been violated, is in no way comparable to a strict criminal penalty.

CONCLUSION

The lower court impermissibly accorded Respondent standing to assert the rights of charities and struck down as facially violative of the First Amendment a reasonable regulation, that the record demonstrates, would have to be upheld even if challenged as applied. For these reasons, the decision of the Court of Appeals should be reversed with instructions to remand for dismissal of Munson's action or, in the alternative, for the entry of a declaration decreeing that Section 103D of Article 41 of the Maryland Code is constitutional and not violative of the First Amendment.

Respectfully submitted,

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Exhibit A

EXECUTIVE DEPARTMENT
OFFICE OF THE SECRETARY OF STATE
STATE HOUSE
ANNAPOLIS, MARYLAND 21404

PATRICIA G. HOLTZ
ACTING SECRETARY OF STATE

A. 2

STATE OF MARYLAND

FOURTH ANNUAL REPORT
OF THE
SECRETARY OF STATE
ON
CHARITABLE ORGANIZATIONS

Article 41, Sections 103A-103L, Annotated
Code of Maryland, and Code of Maryland Regulations
Title 01 Subtitle 02 Chapters 03 and 04

For the period of July 1, 1981 thru June 30, 1982

Harry Hughes, Governor
Samuel Bogley, Lieutenant Governor

Patricia G. Holtz
Acting Secretary of State
July 1982

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Schedule I. Professional Fund-Raiser Counsel and Professional Solicitors

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Schedule III. Exempt Organizations

FORWARD

In accordance with the provisions of the Code of Maryland Regulations, the following report has been prepared as of June 30, 1982. As of the close of the period covered by this report, 452 Charitable Organizations were registered with the Secretary of State. This is an increase of 9% over the number of such organizations registered as of June 30, 1981.

Nineteen Professional Solicitors and Fund-Raiser Counsels filed during this period.

The most significant growth occurred in the number of Charitable Organizations which filed as "exempt" organizations under the provisions of Article 41, Section 103C. Such organizations were determined to be exempt from the requirement that they file a registration statement. This is an increase of 10% over the number reported last year.

Patricia G. Holtz
Acting Secretary of State

PATRICIA G. HOLTZ
ACTING SECRETARY OF STATE
ANNAPOLIS, MARYLAND 21404

July 1, 1981 thru June 30, 1982

Registered Charitable Organizations	452
Exempt Status Organizations	1392
Professional Fund Raiser Counsels	22

DISPOSITION OF APPLICATIONS REQUESTING AUTHORIZATION TO EXCEED ARTICLE 41, SECTION 103D FUND-RAISING LIMITATION

July 1, 1982

Organization	*Date Application Approved or Denied*	*Proposed Fund-Raising %*	*Name of Solicitor*	*Charitable Organization's Reason for Seeking Approval*
Maryland Amateur Boys Baseball Champion Series	October 14, 1980	75%	Dennis Advertising	Economically impossible to produce program within 25% limit. (Solicitor never registered.)
Md. Troopers Assoc.	October 15, 1980	64%	Brent-Wyatt Assoc.	Org. selected has reputation and capacity to produce product of high quality and efficient operation.
New Life Corporation	October 15, 1980	48%	Ronald K. Sanders	Use of solicitor only feasible way for organization to raise funds.
Anne Arundel County Professional Firefighters Assoc. Local 1563	January 23, 1981	74%	Domino Productions	Organization incapable of effectively conducting fund raiser.
Baltimore County Firefighters	March 30, 1981	77.1%	Domino Productions	Organization is incapable of effectively conducting a fund raising campaign.
Howard Co. Police Officers Assoc.	May 12, 1981	Denied	Capital Presentations	No fund-raising experience, no manpower.
Howard Co. Police Officers Assoc.	June 1, 1981	80%	Capital Presentations	Organization lacks experience, manpower, and time; past efforts unsuccessful.
FOP, Md. State Police Lodge 12	June 8, 1981	65%	Domino Productions	Organization not capable of conducting effective campaign.
Howard Co. Firefighters Lodge 2000	July 1, 1981	Denied	Capital Presentations	Cost of Country-Western show would exceed limits.
FOP, Md. Troopers Lodge 76	July 8, 1981	77%	Domino Productions	Organization lacks time, expertise and manpower.
Anne Arundel Co. Professional Firefighters Local 1563	October 9, 1981	Denied	Domino Productions	Organization incapable of conducting fundraiser.
Anne Arundel Co. Professional Firefighters Local 1563	Dec. 23, 1981	65%	Domino Productions	To establish a building fund.
FOP, Md. Troopers Lodge 76	March 16, 1982	83%	Domino Productions	To establish a building fund.
FOP, Baltimore City Lodge 3	June 2, 1982	70%	Summerfield Enterprises	Past fund raising activities of the Organization were unsuccessful.
FOP, Md. State Police Lodge 12	June 2, 1982	83%	Domino Productions	To establish a building fund.
Angelo Rizzuto	June 29, 1982	80%	Domino Productions	Proceeds to be used to repair facilities.

Exhibit B

AGREEMENT CONTRACT

1—This agreement entered into by and between the JOSEPH MUNSON CO., INC., 3170 N. Federal Highway, Lighthouse Point, Florida, hereinafter to be known as the Party of the First Part and the FRATERNAL ORDER OF POLICE MONTGOMERY LODGE #35, hereinafter to be known as the Party of the Second Part is for the purpose of holding a Benefit Fund Drive, hereinafter to be known as the "SHOW".

2—The Party of the First Part agrees to take complete charge of the sale and disposition of tickets and records to the Benefit Fund Drive.

3—The Party of the Second Part shall have the right to object to employment of any person and upon receipt of such objection, the Party of the First Part shall immediately discharge the person objected to.

4—The Party of the Second Part agrees to assist and cooperate with the Party of the First Part in all phases of the Benefit Fund Drive, in that, the "SHOW" will be sponsored under the name of the Party of the Second Part and at the request of the Party of the First Part will furnish a contact man to open mail, do the necessary banking required and to assist whenever necessary. It is further agreed that the Party of the Second Part agrees to obtain all license and permits that may be required.

5—It is understood and agreed by and between the Parties hereto, that the expenses of orchestra, entertainers, hall, tickets, telephones, telephone help, office supplies, office rent, stenographic help, insurance, city directory, postage, printing and stationery used in the promoting of the "SHOW" shall be known as joint expenses and shall be paid from gross receipts as well as any other legitimate expenses in connection with the "SHOW" as shall be mutually agreed upon by the Parties hereto.

6—It is agreed that all check, money orders and monies derived from sale of tickets, admissions and door receipts shall be known as gross receipts and shall be made payable to the Party of the Second Part and delivered thereto. Concession receipts, hat and cloakroom receipts shall be the sole property and responsibility of the Party of the Second Part.

7—IN CONSIDERATION of the part to be done and performed by the Party of the First Part in the Benefit Fund Drive, the Party of the First Part is to receive a fee of fifty per-cent (50%) of the Net Proceeds after the joint expenses hereinbefore enumerated and the Party of the Second Part agrees to pay over this fee on Friday of each week and make a settlement after the conclusion of the "SHOW" promotion.

8—It is mutually agreed by and between the Parties hereto, that this contract shall be in force for a period of one (1) year with one (1) "SHOW" to be held at a time and place agreeable to both Parties hereto.

In the event of a failure of the Benefit Fund Drive, all monies derived as gross proceeds shall be used to pay all obligations and any remaining expenses shall be paid by the Party of the First Part, thereby holding the Party of the Second Part blameless for any expenses regardless of the success of the Benefit Fund Drive.

9—In agreement on all of the above enumerated paragraphs and agreements, we the Parties hereto do hereby set our hands and seals this 20th day of

January, 1982, in Montgomery County, City of Gaithersburg, State of Maryland.

JOSEPH MUNSON CO., INC.

JOSEPH MUNSON
Party of the First Part

FRATERNAL ORDER OF POLICE
MONTGOMERY COUNTY LODGE #35

LAWRENCE C. DEAMONS
Party of the Second Part

DONNA E. (ILLEGIBLE)
Witness:

JOHN WILLIAMS
Witness:

Office-Supreme Court, U.S.
FILED
APR 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-766

In The
Supreme Court of the United States
October Term, 1982

SECRETARY OF STATE OF MARYLAND,
Petitioner,

vs.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether a litigant who meets the Article III test of injury in fact, and whose activities are inextricably linked to the constitutional rights of third party charities, may raise those rights in support of a challenge to the constitutionality of a state statute regulating charitable solicitation.

2. Whether a litigant who meets the Article III test of injury in fact, and who demonstrates that a state statute regulating charitable solicitation substantially infringes the First Amendment rights of a class of charitable organizations, may raise the rights of that class in support of a challenge to the constitutionality of that statute.

3. Whether a state statute regulating charitable solicitation is unconstitutionally overbroad under the First and Fourteenth Amendments, where it is shown that the statute substantially affects protected interests, but is neither related to asserted state interests, nor is it the least drastic means by which those interests could be served.

4. Whether a power vested in the Secretary of State by a state statute regulating charitable solicitation, enabling the Secretary to exempt certain groups from the statute's prescriptions, vests the Secretary with excessive discretion, thus rendering the statute unconstitutionally vague.

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No. 82-766

In The
Supreme Court of the United States
October Term, 1982

SECRETARY OF STATE OF MARYLAND,
Petitioner,

vs.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT

RESPONDENT'S STATEMENT OF THE CASE

In Petitioner's Statement of the Case, a number of assertions are made with regard to the statute at issue, and to the history of the case. Respondent, the Joseph H. Munson Company, Inc. (Munson), takes exception to several of those assertions, and will correctly set forth below the matters that were inaccurately stated.

A. History of the Case

One of the issues heavily relied upon by the State in this cause is that of Munson's standing to challenge §103D. Throughout the proceedings below, and again in its brief,

the State has characterized the oral stipulation agreed to at trial as inadequate to support that challenge. See, *e. g., Br. of Pet.* at 12, 18 (note 12).[1] In fact, the stipulation demonstrates a proper factual basis for this case, and the State, having agreed to the stipulation, cannot now look behind it by denying its contents.

Munson's business in Maryland is as a professional fundraiser counsel; it counsels organizations that desire to raise funds on how best to accomplish their goals, and promotes and operates fundraising campaigns and events. Munson's contracts call for a payment of a percentage of the funds raised by a given event, and this percentage is in excess of 25 percent of the funds raised (net of such expenses as are excluded by the statute). The controversy arose when the groups seeking to contract with Munson for fundraising, the Fraternal Orders of Police (FOPs) of the various counties in Maryland, began to fear criminal prosecution because of Munson's contract terms. Section 103D, by making it a crime to ". . . pay or agree to pay as expenses . . . a total amount in excess of 25% of the total gross raised . . .", subjected those groups to prosecution merely for contracting with Munson.

The various chapters communicated their fear to Munson, indicating that they would cease doing business with the company because of their potential criminal liability.

Munson consulted with counsel, who determined, through conversations with representatives of the State of Maryland, that the statute was being actively enforced. Subsequently, Munson and counsel were informed that the

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[1]Citations to appendices and briefs are abbreviated as follows: Brief of Petitioner—*Br. of Pet.;* Petition for Writ of Certiorari—*Pet.;* Opposition to Writ—*Opp.;* Appendix to Petition for Writ—*APC.*

failure to conform to the statute would result in the State filing criminal charges for the violations.

Because its contracts called for a fee in excess of that permitted by §103D, Munson was faced with the choice of ceasing to do business in Maryland, and thereby losing the entire amount of its revenue in Maryland, or subjecting itself to civil and criminal liability under §103L. An action was then brought against the Secretary of State of Maryland challenging the statute. At the trial held June 16, 1980, Munson was prepared to adduce testimony regarding the controversy and factual basis of the case; however, for reasons of judicial economy, and because all of the relevant facts were undisputed, the parties entered into a five-point stipulation:

> 1. That the Charitable Solicitation Laws contained in Article 41, Section 103, *et seq.* of the *Annotated Code of Maryland* (1978, 1979 Cum. Supp.) which limits the amount that can be allocated for fund raising expenses are generally enforced in the State of Maryland.
>
> 2. That the Fraternal Order of Police, Montgomery County Chapter, (hereinafter referred to as FOP), is reluctant to enter into a contract with the Plaintiff, Joseph H. Munson Co., Inc., (hereinafter referred to as Plaintiff) for promotion of fund-raising events due to the limitation imposed by Article 41, Section 103, *et seq., supra*, that nothing in excess of 25% of the gross income raised through fund raising activities may be expended on fund raising expenses.
>
> 3. That the Plaintiff's contract with the FOP calls for a fee in excess of 25% of the net income raised through fund raising activities.
>
> 4. That the FOP is engaged in the dissemination of information and the advocacy of causes on behalf of police officers.

5. That except for the contractual relationship regarding promotion of fund raising activities, as indicated above in Number 3, there exists no other financial relationship between the Plaintiff and the FOP.

The stipulated facts, while brief, are clear and sufficient to establish the adverse nature of the parties' positions.

They establish, as Munson was prepared to prove, that the fundraising contracts call for a fee in excess of 25 percent of the income raised, *net of all expenses exempted by the statute.* Therefore, under §103D, any group, including the FOPs, would be criminally liable if they contracted with Munson, *as wou'd Munson.*

The stipulation establishes, as Munson was prepared to prove, that the statute in question is generally enforced in Maryland. In other words, the fear of prosecution is not theoretical, but real and substantial.

The stipulation establishes, and Munson was prepared to prove, that the Montgomery County Chapter of the FOP was reluctant to contract with Munson *due to the limitations imposed by the statute.* Despite Petitioner's characterizations, the meaning of this stipulation is clear —because of the statute, Munson stands to lose all of its revenue in the State of Maryland.

The stipulation establishes, and Munson was again prepared to prove, that the FOPs engage in the advocacy of causes on behalf of their member officers, and disseminate information to them and to the public about those causes.

Respondent could easily have adduced testimony proving all of the facts contained in the stipulation, creating a

lengthy record and consuming much judicial time. Petitioner cannot now complain that the record is sparse in the face of its acceptance of the stipulation, and because of the fact that Respondent relied upon the stipulation by not offering testimony at trial. The stipulated facts, mutually agreed to, must be accepted as conclusive on the factual issues to which they pertain.

In a manner similar to its treatment of the stipulation, the State has sought to characterize certain arguments of Munson's as afterthoughts. Specifically, Petitioner asserts that the "local discretion" argument was not made until the case was before the Maryland Court of Appeals. *Br. of Pet.* at 14; *Pet.* at 16. Despite Respondent's clarification in its Opposition to the Writ (Opp. at 5, note 3), the assertion was again made in the State's brief on the merits. Respondent first raised the excessive discretion argument at trial, and in a Memorandum of Law to the trial court. That memorandum can be found in the record of the case, dated July 1, 1980.

Respondent maintains that its argument has remained essentially unchanged since the amended complaint was filed in Circuit Court; however, only the Court of Appeals has been willing to address all of the issues raised.

B. The Statutory Scheme

Petitioner in its brief has attempted to characterize the challenged statute, Article 41, Section 103D Annotated Code of Maryland, 1957 (1982 Repl. Vol.), as a "liberal" and "flexible" regulation, one that imposes a "miniscule" burden upon charitable organizations. See, *e. g.*, *Br. of Pet.* at 10. Primarily the State relies upon the exemption

power contained in §103D; that is, the power of the Secretary to:

> "... issue rules and regulations to permit a charitable organization to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income *in those instances where the 25% limitation would effectively prevent the charitable organizations from raising contributions.*" Section 103D(a) (emphasis supplied).

However, it is clear that the Court of Appeals of Maryland has interpreted the exemption power as insignificant—not at all like the broad interpretation the State has urged:

> "... the authorization for exemption regulations in the Maryland statute is *extremely narrow*. The Secretary, in promulgating regulations for permits waiving the 25% expense limitation, is confined to 'those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.' Article 41, Section 103D." *Munson v. Secretary of State*, 448 A. 2d 935, 946 (1982), *APC* at 20 (emphasis supplied).

The Court went on to point out that the focus of the exemption power, the *ability* to raise funds within the limitations, would not serve to exempt those groups identified as protected in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620 (1980).

Therefore, the expansive interpretation of the statute urged by the Secretary since this case began is no longer valid. The highest court of the State of Maryland has authoritatively construed the exemption power to be "extremely narrow," and that interpretation is binding on the State. The State cannot now argue to this Court that the power is broad and flexible; in effect, denying the construction given by the Court of Appeals. Sim-

ilarly, this Court is bound by the construction given a state statute by the highest court of a state. *NAACP v. Button*, 371 U. S. 415, 432 (1963).

SUMMARY OF ARGUMENT

The Maryland Court of Appeals correctly concluded that Article 41, Section 103D of the Maryland Code was unconstitutionally overbroad in violation of the First and Fourteenth Amendments, and that Respondent was a proper party to challenge the statute.

As evidenced by the oral stipulation agreed to at trial by Respondent and Petitioner, Respondent will be greatly injured by the operation of § 103D. All of Respondent's business in the State of Maryland will be lost, since those contracting with Respondent will be subject to criminal and administrative sanctions. Furthermore, the statute makes Respondent criminally liable for contracts not meeting the requirements of § 103D. Therefore, Respondent has the necessary "injury in fact" to meet the Article III case or controversy requirement for standing.

The activity Respondent wishes to pursue, fundraising, is inextricably linked with Respondent's client charities' rights to combine their advocacy and informational activity with fundraising. In addition, serious obstacles stand in the way of the charities' own assertion of their rights. Very unfavorable publicity would be generated against a charity challenging fundraising regulations. Furthermore, the charities lack the resources necessary to prosecute a court challenge against the statute. There-

fore, Respondent may raise the rights of those charities in support of the challenge.

Section 103D forces charities that combine advocacy and informational activity with fundraising to forego, when choosing an activity, considerations relating to the speech activity. They cannot choose the activity they deem best to promote their views and information, since they must choose the activity with the lowest cost-to-funds raised ratio. Therefore, there exists a substantial class of charities to which § 103D cannot constitutionally be applied. Respondent, having shown injury in fact, may challenge §103D and raise the rights of that class of charities in its support.

Although "prevention of fraud", the main justification for § 103D, is certainly a strong state interest, the statute is insubstantially related to that interest. There is no real relation between a percentage regulation and the existence of charitable fraud. Furthermore, disclosure, publication and penal statutes punish the fraudulent conduct more directly, but with far less drastic effects on speech interests. Therefore, § 103D is unconstitutionally overbroad in violation of the First and Fourteenth Amendments.

The exemption power contained in § 103D, heavily relied upon by the State to save the statute's validity, had been authoritatively construed by Maryland's highest court as far too narrow to account for all of the protected interests infringed by the statute. That construction is binding on the State, and on this Court. Alternatively, even accepting the State's "expanded" version of the power, the statute would still be unconstitutional. By the State's own argument, the Secretary is vested with the

discretion to decide who will be exempted from §103D, and who will not. Such discretion is excessive in a First Amendment context, making the statute invalid.

ARGUMENT

I. Munson Has Standing To Challenge Section 103D On Its Face Since It Has Suffered Injury In Fact, And May Raise The Rights Of Maryland Charities In Support Of That Challenge Under The Jus Tertii And Overbreadth Doctrines.

Two of the issues raised by this case concern the limitations imposed upon judicial review by both Article III of the U. S. Constitution as well as by the prudential policies of this Court. They are, first, the issue of Respondent's standing to challenge Section 103D, and second, the right of Respondent to challenge the statute on its face; that is, on the basis of facial overbreath under the First Amendment.

The standing issue concerns Munson's right to challenge the statute at all: whether there is injury resulting from the statute's operation, and whether Munson may raise the constitutional rights of its clients, the Fraternal Orders of Police, in support of its challenge. The overbreadth issue goes further than that. If the elements required for First Amendment overbreadth standing are met by Respondent, then it may raise in support of its challenge the rights of *all* groups adversely affected by the statute. Those are the groups ". . . to which the [statutory] limitations could not be applied consistently with the First and Fourteenth Amendments . . ." *Schaumburg*, 444 U. S. at 634. In other words, if Respondent is en-

titled to overbreadth standing, then there need be ". . . no demonstration that [Respondent] itself was one of those [protected] organizations." *Id.*

As to the choice of law regarding standing, it is clear that the Court of Appeals of Maryland, although it discussed Maryland law extensively, ultimately relied upon federal law in upholding Munson's standing. *APC.* at 7-10 and 11-13 (quoting *Schaumburg,* 444 U. S. at 633). As set forth below, that decision was correct.

A. Munson Has Standing To Challenge Section 103D Since It Has Suffered Injury In Fact: Loss of Business And Possible Criminal Prosecution.

The first inquiry with regard to standing is whether the constitutional requirement in Article III is met—whether there exists a "case or controversy". In the case of *Singleton v. Wulff,* 428 U. S. 106 (1976), this Court described the question as ". . . whether the plaintiff-respondents allege 'injury in fact', that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a Federal court's Article III jurisdiction." 428 U. S. at 112. Of course, this requirement, being jurisdictional, must be met by the Respondent.

There is little doubt that Munson has suffered and will suffer concrete injury from the operation of the statute in question. A substantial source of revenue in years past, the FOPs of Maryland, will be cut off because these organizations will not enter into contracts that expose them to criminal liability. On the other hand, if the statute is held to be invalid, Munson will be able to continue to conduct business and generate revenue in Maryland while the State will lose an enforcement power conferred

by its statutes. Just as in *Singleton*, "the relationship between the parties is classically adverse, and there clearly exists between them a case or controversy in the constitutional sense." 428 U. S. at 113.

Furthermore, it cannot be said that the statute is not the "cause" of the injury merely because there are third parties, the FOPs, who actually withdraw their business from Munson. Although the "injury in fact" analysis includes the requirement that the relief sought must remedy the injury complained of, it is clear that that requirement is fulfilled here. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U. S. 29 (1976).

Unlike *Simon*, the relief sought in this case would necessarily have a significant effect on Respondent, as well as its third party clients. The FOPs contracted with Munson in prior years, and have every intention of doing so again—if the statute preventing them is invalidated.[2] In other words, *but for* the provisions of §103D, Munson would earn substantial revenue through contracts with the FOPs.

In addition to the obvious economic injury, Munson faces the administrative and criminal penalties contained in Section 103L. They are: (1) cancellation of registra-

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[2]In fact, as cited by Petitioner, Munson has signed contracts with several chapters during 1982. *Br. of Pet.* at 12 (note 9) and 18 (note 12). Contrary to Petitioner's assertions, these contracts do not prove a lack of potential injury; rather, the contracts are the result of counsel's opinion as to the invalidity of the statute, as well as an apparent reluctance on the part of the State to prosecute during the pendency of this case. The contracts do, however, prove that the FOPs will contract with Munson if the challenged statute is invalidated.

tion, (2) civil injunction, and (3) criminal prosecution.[3] There is no doubt that the jeopardy of a criminal prosecution is, by itself, injury sufficient to meet the case or controversy requirement. (cite). Thus there are two distinct injuries resulting from the statute's operation, each fulfilling the "injury in fact" requirement.

Munson has shown that because of the provisions of Section 103D, it will suffer economic loss, and also faces possible administrative and criminal actions; furthermore, that the invalidation of the statute would completely remedy this injury. Therefore, the threshold requirement of Article III, that there exist a "case or controversy", has been fully met in this action by Munson's demonstration of "injury in fact."[4]

B. Munson May Raise The Rights Of Maryland Charities In Support Of Its Challenge Under The Jus Tertii And Overbreadth Doctrines.

Munson's relationship with the FOPs raises another standing issue: Munson's right to raise, in support of its challenge, the constitutional claims of parties not before the Court (hereinafter referred to as "third-party standing"). Even though Munson has clearly demonstrated injury from the statute, and therefore has the right to challenge it, "ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U. S. 249, 255 (1953).

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[3]The characterization of these provisions by the State as "the *only* penalties for violating § 103D" is very surprising, considering their great impact upon fundraising organizations. *Br. of Pet.* at 8 (emphasis supplied).

[4]Although asserting that injury to Munson is merely "possible", the State concedes that Munson has the requisite injury to meet the Article III limitation. *Br. of Pet.* at 18 (note 12).

It has been often said that the rule against third-party standing, unlike the case or controversy requirement, is not constitutionally mandated, but rather, prudential in its source. *Craig v. Boren*, 429 U. S. 190, 193 (1976). This is not to say that the rule does not have very strong policy reasons behind it (see *Singleton*, 428 U. S. at 113-114), but rather, "like any general rule, this one should not be applied where its underlying justifications are absent." *Id.* at 114.

Consequently, this Court has developed two very limited exceptions to the general third party standing rule for situations where either the underlying justifications are absent, or where competing policies outweigh those justifications. The first exception is based upon the relationship of the party before the court, and the activity that party seeks to pursue, to the person holding the legal right sought to be asserted. This is the so-called *jus tertii* exception to the traditional doctrine of federal standing. Where the relationship of the litigant to the third party is such that " . . . the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue . . . ", this Court has permitted a litigant to assert the rights of third persons not before the Court. *Singleton, supra*, 429 U. S. at 114. The expanded standing is permitted because the two primary policy considerations against third party standing, unnecessary adjudication and possibly ineffective advocacy, are simply not present under such circumstances. *Id.* at 115.

The second exception is for litigants challenging a statute on the grounds of First Amendment facial overbreadth. Because First Amendment freedoms are so jealously guarded, this Court has determined that the

policy considerations in favor of allowing expanded standing in such cases outweigh those against it. See, *e. g.*, *Bigelow v. Virginia*, 421 U. S. 809 (1975).

The result of qualifying for either of the two exceptions is usually the same: as long as there has been demonstrated injury in fact, a litigant may raise the rights of third persons not before the court in support of its claim. However, there is a great difference in the scope of the two exceptions. Under *jus tertii* standing, the litigant is limited to raising the rights of those particular third parties with whom his relationship has earned him the expanded standing. Such a litigant would be asserting the rights of designated persons. On the other hand, a litigant with overbreadth standing may raise the rights of all persons whose First Amendment rights are adversely affected by the challenged statute; in effect, the litigant may assert the rights of what in essence are undesignated persons. See *Schaumburg*, 444 U. S. at 634.

The distinction may not be necessary in order to decide the question of standing, however, since it is Respondent's position that it satisfies both of the exceptions — *jus tertii* and overbreadth.

1. The relationship between Munson's activities and the rights of the FOPs is sufficient to permit Munson to raise those rights in support of its challenge.

This exception to traditional standing doctrine is based upon the relationship between the litigating party and third parties not before the Court. As noted earlier, the reason for this exception is that when there is a sufficient relationship between the litigant and the third

party, the policy considerations underlying the general rule against third party standing are absent.

This Court has stated those policy considerations to be, first, the desirability of avoiding unnecessary adjudication of constitutional rights, and second, that third parties are presumed to be the best proponents of their own rights. With regard to the former, it may be that the holders of those rights are able to enjoy them whether or not the litigant is successful. In that case, a court's construction of those rights would be unnecessary. *Singleton, supra,* 428 U. S. at 114.

As to the latter, this Court relies upon the advocacy of the parties before it to properly decide a case, and wishes to have the most desirable advocates as parties. The third parties may also prefer to assert their own rights, since they will be bound by a decision under the doctrine of *stare decisis. Id.* at 114.

To determine whether those policy considerations are present in a given case, the Court has established a factual test to aid its inquiry. The test is the nature of the relationship between the litigant and the third party. "If the enjoyment of the right [by the third party] is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary. . . ." *Id.* In other words, if the right depends on the activity litigated, then a decision on the activity would certainly affect the enjoyment of the right.

In the case at bar, Munson's activity provides the FOPs with the ability to choose the fundraising methods they deem most appropriate to their advocacy and infor-

mational activities. See Section II and III, *infra*. These methods, being more expensive relative to the funds raised, would be cut off if Munson's challenge fails. The FOPs would be forced to limit their advocacy activities (the constitutional right), because of the ban against Munson's activity. It is clear that adjudication of the right is not unnecessary, since enjoyment of the right would be greatly affected by the success or failure of Munson's challenge.

In addition, the Court has sometimes looked to " . . . the ability of the third party to assert his own right." *Singleton*, 428 U. S. at 115. This test enables the Court to determine whether the third party's absence suggests that his right is not actually at stake (making its adjudication unnecessary), or whether, because of some "genuine obstacle" to the third party's involvement, the litigant is " . . . the right's best available proponent." *Id.* at 116.[5]

The obstacle to the third party litigating its own rights need not be so large as to make it impossible, or even nearly so. All that is required is a showing that the third party has been somehow discouraged, in a practical sense, from participation in the litigation. See *Singleton*, 428 U. S. at 116 (note 6).

Thus, in *Singleton*, the obstacle to the woman's assertion of her own rights was the fact that " . . . she may

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[5]While Respondent asserts that it meets this second test, as set forth below, it is also asserted that this additional test is no longer required under *Craig v. Boren*, 429 U. S. 190 (1976). In that case, beer sellers were given third party standing to challenge a discriminatory drinking age, even though the third parties (males, age 18-20) could have easily litigated the issue. The Court made no mention of this second test.

be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit." *Id.* at 117. Clearly, the obstacle need not be insurmountable. Indeed, as noted in *Singleton*, the woman could have brought suit under a pseudonym. *Id.* There need only be some factual basis for not presuming that the third party's absence means that the right will be unnecessarily adjudicated.

In the instant case, a very similar obstacle stands in front of the FOPs' participation in this litigation. Because of the very statute being challenged, titled the "Maryland Charitable Organizations Law", and because the law was passed in response to the Pallotine Fathers scandal (an allegedly fraudulent charitable solicitation activity; see *Br. of Pet.* at 11 (note 8)), FOP participation in the litigation would surely raise a question among donors as to their financial trustworthiness. It is likely that the average citizen would conclude that the FOPs were attempting to evade State regulation, when in fact, they were merely attempting to protect their First Amendment rights.

Furthermore, charitable organizations such as the FOPs lack the financial capability to prosecute such costly litigation, and are thus hindered in vindicating their rights.

Therefore, serious obstacles stand in the way of FOP participation: the risk of losing their charitable financial support, and the enormous resources required for the challenge. For these reasons, and because of the fact that the FOP's rights would be "diluted or adversely affected" if Munson's challenge fails, Munson is per-

mitted to assert the rights of the FOPs in support of its claims.

2. Because Munson is challenging Section 103D as facially invalid under the First Amendment, Munson may raise the rights of Maryland charities in support of that challenge.

Although *jus tertii* standing is certainly a sufficient basis for Munson's challenge, there exists an even stronger basis — one that is more related to the underlying issues of the case: First Amendment overbreadth standing. The basis for Munson's right to third party standing under the overbreadth exception is best stated by this Court in *Schaumburg*, ~~444~~ U. S. at 634:

> "Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court. [citing cases]."

In other words, a litigant who meets the Article III (case or controversy) test of injury in fact, and whose claim is based upon a statute's overbroad reach into First Amendment interests, will not be limited by the general rule against third party standing; this Court will permit the challenge on the basis of the rights of parties not before the Court.

This expanded standing means not only that Respondent can raise third party rights in its challenge, but also that the State may not defend the statute on the basis of the particular status or characteristics of either Munson or the FOPs. Yet, in its brief, the State asserts that overbreadth standing is unavailable because the FOPs do not engage in advocacy activities (*Br. of Pet.*

at 24 (note 16)), and because Munson's activities bear no relation to those "alleged advocacy activities." *Id.*[5]

The State even goes as far as comparing the *Schaumburg* case, stating that the challenger in that case " . . . had established a relationship between its advocacy and its fund raising . . . " *Br. of Pet.* at 25. Although the Citizens for a Better Environment (CBE) had asserted their protected status as an alternative ground, it is absolutely clear that CBE's particular status and characteristics were irrelevant to the resolution of that case. As recounted by Justice White:

> " . . . The District Court made no findings with respect to the nature of CBE's activities; and the Court of Appeals expressly stated that the facts with respect to the internal affairs and operations of the organization were *immaterial to a proper resolution of the case.* The Village claims, however, that it should have had a chance to prove that the 75 percent requirement is valid as applied to CBE because CBE spends so much of its resources for the benefit of its employees that it may appropriately be deemed an organization existing for private profit rather than for charitable purposes.
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> "We agree with the Court of Appeals that CBE was entitled to its judgment of facial invalidity if the ordinance purported to prohibit canvassing by a substantial category of charities to which the 75 percent limitation could not be applied consistently with the

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[5]The State goes on to refute certain elements of Munson's demonstrated injury in fact (no threat of prosecution and no loss of business) despite having conceded to these injuries just six pages earlier. *Br. of Pet.* at 25. Of course, the claim of failure to exhaust administrative remedies is irrelevant to the issue of overbreadth standing. *Id.* See *Lovell v. City of Griffin*, 303 U. S. 444 (1938) and *Thornhill v. Alabama*, 310 U. S. 88 (1940).

> First and Fourteenth Amendments, *even if there was no demonstration that CBE itself was one of these organizations.*" 444 U. S. at 633-634 (footnote omitted, emphasis supplied).

Clearly, then, Munson's status is not the issue here, and neither is the status of the FOPs.[7] What First Amendment overbreadth standing provides is the ability to raise the constitutional rights of *all* members of the class of organizations identified as protected from the reach of the challenged statute.

Respondent, in Section II below, has identified a substantial class of organizations to which the restrictions of §103D cannot constitutionally be applied. Where this threshold requirement is met, the policy considerations underlying the general ban on third party standing are far outweighed by "... the transcendent value to all society of constitutionally protected expression." *Bigelow, supra,* 421 U. S. at 816. The fear is that the mere existence of such an overbroad statute will inhibit the exercise of rights protected by the First Amendment. For these reasons, the Court permits the challenge to be made even by one whose conduct could be validly regulated by a more narrowly drawn statute. As stated in *Bigelow:*

> "We give a defendant standing to challenge a statute on grounds that it is facially overbroad, regardless of whether his own conduct could be regulated by a more narrowly drawn statute, because of the 'danger of toleration, in the area of First Amendment free-

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[7]Like CBE, we assert that the FOPs are engaged in substantial advocacy and informational activities as an alternative position, and object to the State's continual denial of the conclusiveness of the agreed upon oral stipulation. See Respondent's Statement of the Case.

doms, the existence of a penal statute capable of sweeping and improper applications.' *NAACP v. Button*, 371 U. S. at 433." 421 U. S. at 816.

The State also contends that the overbreadth analysis is "attenuated" by the fact that "conduct and not merely speech is involved." *Br. of Pet.* at 24. The State cites *Broadrick v. Oklahoma*, 413 U. S. 601 (1973), for the proposition that where conduct is involved, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. In effect, the State is arguing that the proper analysis of this case is under the "speech-plus" doctrine of this Court.[8] See *United States v. O'Brien*, 391 U. S. 367, 376 (1968).

Respondent asserts that while solicitation involves conduct other than speech, it is so uniquely connected with that speech as to make the traditional speech-plus doctrine inapplicable. Petitioner's exact argument was characterized by this Court as ". . . a far too limited view of our prior cases relevant to canvassing and soliciting by religious and charitable organizations." *Schaumburg, supra*, 444 U. S. at 628. In fact, this Court has, for all practical purposes, equated charitable solicitation with speech. "Canvassers in such contexts are necessarily more than solicitors for money." *Id.* at 632. "It is clear that [charitable solicitations] are . . . within the protections of the First Amendment." *Id.* at 633.

Thus, the conduct and speech elements are not realistically severable, as they are in the speech-plus cases, pri-

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[8]The *amici* represented by the Commonwealth of Massachusetts also rely on this argument. See *Brief of Amici* at 14-18.

marily because the speech is so dependent upon the solicitation element for its existence. *Id.* at 632. Respondent therefore asserts that it need not satisfy the more stringent speech-plus requirement set forth in *Broadrick;* however, it is also asserted that in any event, that requirement is met here.[9]

Because Munson has demonstrated injury in fact, and because this challenge to § 103D is on the basis of facial overbreadth under the First Amendment, Munson may, in support of its challenge, raise the rights of those organizations identified as protected from the unconstitutional sweep of the statute. We now turn to the task of identifying that class of organizations.

II. There Exists A Substantial Class Of Charities To Which Section 103D Cannot Be Applied Consistently With The First And Fourteenth Amendments.

As was the case in *Schaumburg,* there exists a class of charitable organizations whose primary goals involve advocacy and information gathering and dissemination, rather than direct services to the truly needy. 444 U. S. at 635. Since these organizations combine their fundraising efforts with advocacy and communication to prospective donors and others, they will incur substantially higher expenses, very likely in excess of the 25 percent limit placed on them by § 103D. Ironically, as more effort is spent on speech related activities (necessarily taking away effort from the pure fundraising aspects), the more it is likely that a group will exceed the statutory spending limit. It is this class of organizations " . . . to which the [statute] could not be applied consistently with the First

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[9]See Section IIIA, *infra.*

and Fourteenth Amendments . . . " *Schaumburg*, 444 U. S. at 634.

Essentially, this class is the same as the one identified in *Schaumberg*, 444 U. S. at 635. However, since the Maryland Statute is broader in scope, the analysis is slightly different, and therefore the class of organizations is different.

An organization that raises funds through "events" or direct mail and telephone campaigns, as well as through canvassing, trying to attract groups of supporters, must also qualify under the Maryland percentage limitations. It is logical to assume that the more popular a cause is, the more funds that will be raised in its behalf, and therefore, the lower its fundraising cost *per* dollar will be. Conversely, the less popular causes will, by the same logic, necessarily have a higher "cost-to-funds raised" ratio. Under § 103D, therefore, the class of organizations to which the percentage limitation cannot be constitutionally applied is most likely to include advocacy-type organizations whose views are relatively unpopular. Minority views simply cost more to advocate.

The State overlooks what is, in essence, the determinative fact of this case when it argues that there has been no ". . . demonstration that the organizations will not be able to obtain the same services from others at a fee permitted under Section 103D." *Br. of Pet.* at 23. This argument assumes that a charitable organization's only consideration when choosing a fundraising method is its cost and likely return. If this were so, percentage limitation statutes would not be so objectionable.

Those organizations that combine fundraising with speech activities must consider, besides cost, the appropri-

ateness and efficiency of the activity in advocating and disseminating its views and information. The activity chosen must be appropriate to the nature, message and goals of the particular organization. Some organizations, local in character, might use canvassing and handbills throughout a neighborhood. Others, more national in scope, might use direct mail or newspaper advertising. What is clear is that cost and expected return is not the sole, or even the primary consideration of a substantial number of charitable groups.

Nevertheless, § 103D requires those charitable groups to limit their considerations to the cost-to-funds raised ratio, or face administrative and criminal sanctions. Regardless of whether a permit is a condition precedent or not,[10] it is a direct and substantial infringement upon the First Amendment rights of an organization for a statute to dictate the form and content of the group's advocacy and informational activities. Rather than being a "neutral, noncensorial" regulation, as contended by the State, § 103D allows the State to differentiate among organizations solely on the basis of the organization's choice of activities; *i.e.*, its content.

Because of its content-based regulation of First Amendment activity, the statute cannot be applied to any group that engages in speech activity. Furthermore, it is

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[10]The issue of a "prior restraint" is a false issue in this case. There is little practical difference between a statute that requires a permit in advance, and a statute that places criminal penalties on protected activity. The "chill" on First Amendment rights resulting from the latter is as effective a prior restraint as an actual permit requirement, and just as unconstitutional. See *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572 (note 3) (1942).

obvious that a large percentage of charitable groups engage in activities that combine fundraising with advocacy, and therefore fall into the class of groups to which the Maryland statute cannot constitutionally be applied.

Because there exists such a substantial category of such organizations; because the natural effect of a percentage limitation is to favor popular causes over less popular ones; and because organizations have considerations other than cost when choosing their activities, Respondent is permitted to challenge § 103D on the basis of facial overbreadth ". . . even if there was no demonstration that [Respondent] itself was one of these organizations". *Schaumburg*, 444 U. S. at 634 (footnote omitted).

The exemption power contained within § 103D does not affect Munson's entitlement to overbreadth standing. The power granted to the Secretary is, by its very wording, far too limited to have any constitutional significance.[11] To cure the apparent overbreadth, the exemption power must provide for each member of that class of organizations previously identified as protected under the First Amendment. However, the exemption power looks not to the nature of the organization, or to the type of activity it engages in, or even to the reasonableness of its expenses; rather, it looks to whether the organization would be *precluded* from fundraising if it were forced to adhere to the 25 percent limitation. There is a very narrow and specific focus that has no relation to the advocacy nature of an organization. There is no valid construction of the

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[11]Respondent has already noted the effect of the narrow construction given the exemption power by the Court of Appeals. See Respondent's Statement of the Case.

power that would alter its focus to those factors that identify protected activity.

Giving the words of the exemption power their plain and ordinary meaning, the Secretary is vested with the rather limited and defined discretion to determine whether an organization would be "effectively prevented" from raising funds by *any* method under a 25 percent limitation. As noted by the Maryland Court of Appeals, this Court "did not limit its concern [in Schaumburg] to organizations which could not raise contributions without exceeding the 25 percent expense limitations." APC at 21. The real focus of the exemption is on the ability to raise funds, not the type or reasonableness of expenditures.

With the exemption power in mind, the question is whether there still exists a class of organizations to which § 103D cannot be applied. The answer is still yes. Because of the narrow focus of the exemption, it is unlikely that any of the protected class members could avail themselves of it. Consider a typical organization. It may be over the 25 percent limit when it chooses the activities best suited to its advocacy and informational goals, but it might just as easily cut down on advocacy and increase fundraising aspects, or change the type of fundraising activities, or do any number of things that would bring it into the 25 percent rule. If it *could,* in any way, bring those expenses down, it would then be ineligible for an exemption, not being without any means of raising funds under a 25 percent ceiling (in other words, not "effectively prevented"). But it would have had to fundamentally alter its methods from the types and mix of activities that it deems most effective for its advocacy and informational activities. It may have to cut expenses by reducing staff,

or reaching less people. The effect of the statute would be to limit the number or type of issues confronted, or its effectiveness in dealing with any of them.

Thus, the statute, even with the exemption power, leaves a class of organizations to which the statute cannot be applied consistently with the First Amendment. It is also clear that the Maryland statute, although not a "prior restraint" by its terms, nevertheless exerts a "chilling effect" on speech interests because of its overly broad reach, and because the exemption power is so unrelated to the protected interests of those organizations.

It is because of this chilling effect that facial overbreath challenges are permitted:

> "In these First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the prescription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute." *Schaumburg,* 444 U. S. at 634.

This Court is not inclined to require persons exercising their First Amendment rights to choose between risking criminal sanctions or steering far clear of the statute's reach; in effect "self-censoring" to avoid the expense and risk of prosecution. The Maryland Court of Appeals relied on this very point when it found that there is little practical difference between the actual prior restraint of permit denial (as in *Schaumburg*), and the effective prior restraint that results from the threat of criminal sanctions. "It would seem that the difference . . . is purely a semantic one." *Munson v. Secretary of State,* 424 A. 2d 935, 944 (1982), *APC.* at 17. "We do not believe that . . . there

is any merit in the distinction drawn by the Secretary between "prior restraint" of a form of speech and criminal sanctions for engaging in a form of speech." 424 A. 2d at 945, *APC.* at 18.

A case-by-case process of shaping § 103D's "permissible coverage" (the alternative to facial analysis), even if possible, is not beneficial to protected speech interests. Such a process would suspend freedoms for an indefinite period, and permit intimidation of protected activity by the overbroad scope of the statute. See Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 875 (1970).

Because of the existence of a substantial class of organizations to which the statute cannot constitutionally be applied, the inquiry in this case must be on the basis of the facial validity, under the First Amendment, of Section 103D.

III. Section 103D Is An Unconstitutional Infringement Upon First Amendment Rights, Since It Is A Substantial Limitation On Protected Activity, But Is Neither Sufficiently Related To Asserted State Interests, Nor Is It The Least Drastic Means By Which Those Interests Could Be Served.

Respondent's primary challenge to the statute is that it is unconstitutionally overbroad in violation of the First and Fourteenth Amendments. That is, the statute substantially intrudes upon protected speech interests, but is neither substantially related to asserted state interests, nor is it the least drastic means by which those interests could be served.

Respondent further asserts that the exemption power contained in the statute is far too narrow to be constitu-

tionally significant, and therefore does not save § 103D from overbreadth. As an alternative argument, however, Respondent contends that should the exemption power be viewed to be a much broader grant of authority to Petitioner (as the State suggests), such authority itself is objectionable as creating excessive local discretion in the hands of enforcement officials. In that case, the statute would still be unconstitutional, since the exemption power (even with the regulations issued thereunder) permits too much discretion for it to be valid in a First Amendment context.

The "overbreadth" prong of Respondent's argument primarily relies upon this Court's decision in *Schaumburg, supra*. However, there are differences between the ordinance at bar in that case and the Maryland statute. First, § 103D is substantially broader in its scope. It covers *all* fundraising by charitable organizations, while the Village ordinance is limited to ". . . door-to-door solicitation or the use of public streets and public ways." Schaumburg Village Code § 22-20. Consequently, the statute has a far greater effect on an organization's operations, and thereby its exercise of First Amendment rights.

Second, the Maryland Statute contains an exemption power that authorizies the Secretary to permit non-conforming groups to raise funds under certain limited circumstances. The Secretary has consistently argued that this power is sufficient to save the Statute from constitutional infirmity, while it is Respondent's contention that the power is too narrow to be so effective. In addition, as noted earlier, the Maryland Court of Appeals has agreed with Respondent's interpretation of the exemption power:

that it is "extremely narrow." *APC.* at 20. See Respondent's Statement of the Case.

The constitutional significance of these two provisions is the focal point of this case. However, it should be noted that Respondent relies not only on the *Schaumburg* overbreadth analysis, but also on the "local discretion" analysis of cases such as *Schneider v. Irvington*, 308 U. S. 147 (1939), and *Hynes v. Mayor of Oradell*, 425 U. S. 610 (1976). With that in mind, we turn to the specific arguments advanced by Respondent.

A. Section 103D Is A Substantial Limitation On Protected Activity.

Before attacking a statute as overbroad in violation of the First Amendment, a preliminary issue must be dealt with. This issue, always a threshold question in a First Amendment challenge, is whether the statute involved actually affects substantially those interests protected by the First and Fourteenth Amendments.

The activity sought to be regulated by the Maryland statute is public fundraising by charitable organizations. This Court has held that charitable solicitation ". . . is within the protections of the First Amendment." *Schaumburg*, 444 U. S. at 633. Although state regulation may appear to concern only the appeal for funds, and not the speech activity itself, such regulation affects speech interests that are inextricably linked to the solicitation. As noted earlier, to say that the statute's overbreadth is insubstantial because it regulates "only" soliciting is to take ". . . a far too limited view of our prior cases relevant to canvassing and soliciting by religious and charitable organizations." *Id.* at 628.

Charitable solicitation involves several speech interests; among them are: communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes. For this reason, any regulation of solicitation must take into account:

> ". . . the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Id.* at 632.

Therefore, charitable fundraising is linked with speech interests in two ways. First, solicitation is based upon appeals for support, that support to be in the form of money. The political and economic structure of the United States relies very heavily upon "grassroots" fundraising methods whereby citizens cast economic votes of dollars to the causes that they support. Consequently, the appeal for funds is not just riding along with the appeal for support —it *is* the appeal for support. Furthermore, that appeal necessarily involves dissemination of views and information, as well as advocacy of causes.

Second, this Court in *Schaumburg* took note of the economic reality that without solicitation, the speech activity (advocacy and information dissemination) would likely cease.

Such activity, whether intertwined with solicitation, or economically supported by it, is protected activity under the First Amendment. It does not become unprotected by being in the form of a solicitation to contribute money. *Id.* at 633. See *Bates v. State Bar of Arizona*, 433 U. S. 350 (1977).

Finally, this case does not involve purely commercial speech, since charitable solicitation is not merely concerned with private economic decisions (the cost and characteristics of goods and services). Although the First Amendment is applicable to such speech, the distinction remains relevant for purposes of the overbreadth doctrine. *Schaumburg*, 444 U. S. at 632.

Based upon those authorities, it is clear that the Maryland statute directly affects substantial First Amendment rights, and there is no serious argument to the contrary.

Respondent has also established that it is a proper party to challenge the statute, and that Respondent can raise the rights of persons not before the Court in support of that challenge. It has also been established, by identifying a class of organizations to which the spending limitation cannot constitutionally be applied (despite the exemption power contained in Section 103D), that the challenge may proceed on the basis of the statute's facial validity.

With those threshold questions answered, the underlying issue becomes apparent: whether the State of Maryland, in enacting Section 103D, exercised its power to regulate solicitation in a manner that infringes upon First Amendment rights.

Because of the nature of the exemption power, and because of the claims the State makes regarding that power, it is necessary to answer this issue in two parts. First discussed will be whether the exemption power has any effect at all on the statute's obvious overbreadth. In other words, whether the power enables the State to regulate solicitation without violating the First Amendment, as the State claims it does.

The second discussion is relevant only if the exemption power proves to be up to the task of curing the statute's overbreadth. For even if the exemption power is found to be sufficient to save § 103D in an overbreadth context, Respondent contends that such a power would place excessive discretion in the hands of the Petitioner, and is therefore itself objectionable.

B. Section 103D Is Insufficiently Related To Asserted State Interests, And Is Not The Least Drastic Means By Which Those Interests Could Be Served.

Where a statute substantially affects First Amendment freedoms, as does § 103D, a heavy burden is placed upon the State. For the statute to be valid, the State must show that it is "necessary" to effect a "strong, subordinating" state interest. "Necessary" means that the statute must be substantially related to the proffered state interests, and that there must not be any means with less drastic effects on speech that would serve those state interests.

Respondent contends that Section 103D (indeed, almost any percentage limitation statute) is insufficiently related to state interests to justify its very substantial intrusion upon protected speech interests. Furthermore, even if the statute was so related, there exist other, far less intrusive (and probably more efficient) means by which the state interests could be accomplished.

As was done earlier in this brief, with regard to standing, the Maryland statute will first be analyzed without the exemption power, then analyzed with that power, in order to determine the effect, if any, that the power has on the analysis.

Excluding the exemption power, the statute would be unquestionably unconstitutional, for it would be a near carbon copy of the ordinance struck down in *Schaumburg*: a simple, 25 percent limitation on fundraising costs. The *Schaumburg* ordinance failed because it could not meet any of the elements recited above. It was overbroad (sweeping protected activity within its ambit), it was insubstantially related to the asserted state interests, and, especially emphasized in the opinion, it was not the least drastic means available to serve those interests. This Court, in analyzing those elements, and concluding that the proffered justifications for the spending limit were inadequate, stated:

> "Prevention of fraud is the Village's principal justification for prohibiting solicitation by charities that spend more than one-quarter of their receipts on salaries and administrative expenses. The submission is that any organization using more than 25 percent of its receipts on fundraising, salaries, and overhead is not a charitable, but a commercial, for-profit enterprise and that to permit it to represent itself as a charity is fraudulent. But, as the Court of Appeals recognized, this cannot be true of those organizations that are primarily engaged in research, advocacy, or public education and that use their own paid staff to carry out these functions as well as to solicit financial support. The Village, consistently with the First Amendment, may not label such groups 'fraudulent' and bar them from canvassing. . . . Nor may the Village lump such organizations with those that in fact are using the charitable label as a cloak for profitmaking and refuse to employ more precise measures to separate one kind from the other. The Village may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.

citations omitted). 'Broad prophylatic rules in the area of free expression are suspect. Precision of regulation must be the touchstone. . . .' *NAACP v. Button*, 371 U. S. 415, 438 (1963). (citations omitted).

"The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly. *Schneider v. State*, 308 U. S. at 164; *Cantwell v. Connecticut*, 310 U. S. at 306; *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U. S. at 771 (1976).[a] Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed.[b] Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses.

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444 U. S. at 636-638 (some footnotes omitted).

"[a] The Village Code, for example, already contains direct proscriptions of fraud by commercial solicitors. Section 22-12 of the Village Code makes it 'unlawful for any peddler of solicitor to cheat, deceive or fraudulently misrepresent, whether through himself or through an employee, while acting as a peddler or solicitor in the village. . . .' Unlike the situation in *Ohralik v. Ohio State Bar Association*, 436 U. S. 47 (1978), where we upheld disciplinary action taken against an attorney who solicited accident victims for the purpose of obtaining remunerative employment, charitable solicitation is not so inherently conducive to fraud and overreaching as to justify its prohibition.

"[b] Illinois law, for example, requires charitable organizations to register with the State Attorney General's Office and to report certain information about their strucure and fundraising activities. Ill. Rev. Stat., ch. 23, § 5102(a) (1977)."

Turning to the Maryland statute, it is clear that the same analysis applies. The prevention of fraud is again the main justification for the limitation,[12] and it is just as true in Maryland as in Illinois that a percentage limitation "only peripherally" promotes that asserted justification. 444 U. S. at 636. When the class of organizations affected by the statute includes those organizations identified as protected, it is simply not true that spending greater than 25 percent of receipts on expenses is necessarily fraudulent. The violator may merely be advocating an unpopular point of view, or may just put so much emphasis on advocacy that its expenses are high relative to the funds generated. On the other hand, an organization could conceivably be misappropriating up to 25 percent of funds raised and still be within the statute.

Simply put, because an organization has other considerations besides cost and likely return when choosing a fundraising activity (and, indeed, it is their First Amendment right to consider those other factors that relate to their speech activity), the resulting percentage cost of raising funds has absolutely no relationship to actual fraudulent or deceptive behavior.

Since percentage requirements are so insubstantially related to the governmental interests proffered here, the

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[12]The *amici*, through the Commonwealth of Massachusetts, have sought to expand the governmental interests asserted in support of percentage regulation. *Brief of Amici* at 3-5. However, it is clear that the asserted interests are merely different ways of saying "prevention of fraud" (e. g., ". . . to prevent breaches of trust . . .", *Id.*).

State cannot carry its burden, and, for this reason alone, § 103D is unconstitutional.[13]

Upon analyzing the other requirement, the "least drastic means" test, a similar result is reached. In *Schaumburg,* this Court noted several methods that would be much more effective in serving the state interest, while at the same time less intrusive on the First Amendment. First, the Court expressly approved disclosure statutes, designed to contribute to informed decision-making by disclosing financial information, yet leaving the ultimate decision whether to contribute where it belongs—with the individual. 444 U. S. at 638.

Second, the state can always punish *actual fraudulent conduct* (misappropriation, etc.) by charities under the penal laws. *Id.* at 637.

Finally, and most importantly, this Court has demonstrated a clear preference for statutes that allow individuals to act as their own censors rather than vesting a state official with the power to censor on their behalf. The Court cited with approval provisions of the Schaumburg Village Code allowing *individual* homeowners to bar solicitors by posting appropriate signs, again leaving the decision to the individual. See *Rowan v. Post Office Dept.,* 397 U. S. 728 (1978); *Martin v. Struthers,* 319 U. S. 141, 148 (1943); cited at 444 U. S. 639.

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[13]There is no doubt that the interests asserted by the State and the *amici* are sufficiently strong. The real issue, however, is whether the means chosen (percentage regulation) further those interests so substantially as to justfy their great burden on First Amendment rights.

Nothing in the Petitioner's brief suggests that any of these alternatives to percentage limitation are not equally applicable to Section 103D of the Maryland code, and Respondent urges that because of these readily available, less burdensome, and more effective means, the Maryland statute cannot be upheld.[14]

IV. The Exemption Power Contained In Section 103D Does Not Save The Statute's Validity, Since It Is Far Too Narrow In Scope; Alternatively, If Viewed Broadly, The Power Vests Excessive Discretion In State Officials, Making It Unconstitutionally Vague.

The next step is to consider whether the exemption power changes any of these conclusions. As discussed earlier, it is Respondent's contention that the power is very limited and strictly defined. In our view, it is facially clear that the criterion for an exemption is the ability of the group to raise funds in *any* manner. This criterion has as little to do with the advocacy nature of a 'protected' organization as does the spending limitation have to do with prevention of fraud—almost zero. In other words, the exemption is perfectly clear from a vagueness standpoint, but for the same reasons, it is constitutionally insignificant from an overbreadth standpoint.

As noted earlier, the exception power focuses on the ability to raise funds, only one of the considerations taken into account by an organization seeking to combine fundraising with advocacy and informational activity. The activity chosen by the group as best serving its sub-

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[14]We note that Petitioner failed to address the "least drastic means" issue in its brief.

stantive goals will rarely be the activity with the lowest cost-to-funds ratio. A group seeking an exemption because its choice of advocacy oriented activity will not meet the 25 percent limitation, rather than because of a simple inability to raise funds, will not be eligible for that exemption. In fact, it is interesting to note that the "variety of reasons" for which the State has granted waivers of the 25 percent rule all relate to fundraising ability, not the advocacy or informational nature of the activity. *Br. of Pet.* at 33.

That criterion cannot possibly encompass all of the groups within the identified 'protected class', and therefore, the exemption does not cure the statute's overbreadth. Nor is it possible, by any reasonable construction of the exemption power, to conclude that a percentage limitation with that power is any more substantially related to the prevention of fraud than one without that power. In fact, assuming the power allows greater numbers of fundraisers to operate, there will be a statistical increase in the chance for a fraudulent group operating in the state. Finally, the multitude of less drastic measures mentioned earlier are, of course, still available. It is clear, therefore, that the exemption power, if given its plain and ordinary meaning, cannot save the Maryland statute.

The conclusion to be reached from this analysis is the same as was reached in *Schaumburg*. That is, 'proxy'-type laws (those which use one characteristic, *i. e.*, spending percentage, as a substitute (proxy) for another characteristic, *i. e.*, fraudulent behavior) are, at least in the area of the First Amendment, impermissible. Such laws

are simply insufficiently precise to pass muster in a First Amendment context. *NAACP v. Button*, *supra*, 371 U. S. at 438.

The only thing that can be said in support of percentage statutes is that they are easy to enforce. In a First Amendment context, that is not enough. The answer to the efficiency argument was best given by this Court in *Schneider v. Irvington*, 308 U. S. 147, 164 (1939), (quoted in *Schaumburg*, 444 U. S. at 639), where it is stated:

> "Frauds may be denounced as offenses and punishable by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart that information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."

For these reasons, Respondent asserts that it has demonstrated that the conclusion of the Maryland Court of Appeals was correct: that Section 103D is unconstitutionally overbroad in violation of the First and Fourteenth Amendments.

However, the State raises the argument in its brief that the exemption power, despite its obvious narrowness, and its inappropriate, singular focus, is being administered by the Secretary of State " . . . with special care shown for the rights of advocacy groups", as a "flexible limitation." *Br. of Pet.* at 33 and 28-34. After drawing this "flexibility" out of the air, the State goes on to claim that it is this flexibility that saves the statue, under the

case of *National Foundation v. Fort Worth*, 415 F. 2d 41 (5th Cir. 1969), *cert. den.*, 396 U. S. 1040 (1970).

Respondent has already demonstrated that the exemption power cannot, under any reasonable construction, suddenly become a so-called 'flexible' standard that accounts for all of the protected interests and considerations heretofore discussed. The State's argument also flies in the face of the authoritative construction of the power by the Maryland Court of Appeals, noted earlier, which agrees with Respondent's assertion that the focus of the power is far too narrow to account for the interests protected by the First Amendment. Therefore, the State's insistence that the exemption power saves § 103D is clearly incorrect.

Alternatively, however, Respondent asserts that even if the exemption power makes § 103D truly 'flexible', the statute would still be invalid, for two reasons.

First, although the *Fort Worth* statute was compared to the Schaumburg Code by this Court, it is by no means clear that the *Fort Worth* statute would pass muster if reviewed today. In fact, the concept of "flexible" percentage regulation was conspicuously left out of the alternative and less drastic means expressly approved by this Court in *Schaumberg*. 444 U. S. at 637-639. This is not surprising, because although a flexible regulation it may be, in a sense, less drastic (merely because more groups get to solicit funds), there is no reason to conclude that such a statute has any greater relationship to the prevention of fraud than does a rigid percentage regulation. To the contrary; because of the greater numbers soliciting, it is probably related even *less*. The

State's *post hoc* creation of flexibility within § 103D, therefore, does nothing to correct its unconstitutionality.

Second, even accepting both of the State's assumptions—that the exemption power is broad (and "flexible") enough to permit the Secretary to exempt every protected group, and that such a "flexible" scheme is less constitutionally suspect than a simple percentage regulation—Respondent asserts that an equally serious constitutional infirmity is created: excessive discretion in the hands of the Secretary. In other words, by trying to read too much into the one-sentence exemption power, making it account for the myriad of advocacy and informational considerations referred to earlier, but without the slightest hint of the standards to be applied in evaluating them, the State has traded overbreadth for excessive discretion and vagueness.

The problem of excessive discretion is repeatedly highlighted by the State in its brief. While Respondent has argued that the Secretary's exemption power is well defined and narrow (and therefore insignificant to overbreadth), the State makes extravagant claims as to how the Secretary can use the power to exempt every protected organization in the state, thus saving the statute.

For example, the State claims that the statute does not "chill" the exercise of First Amendment rights, since groups ". . . can quite easily apply for an exception to the percentage limitation and *probably* obtain one . . ." ***Br. of Pet.*** at 24 (emphasis supplied). Such a claim, whether or not it refutes the overbreadth argument, places an organization squarely into the position of having its First

Amendment rights rest solely upon the unguided discretion of the Secretary of State.[15] As stated by this Court in *Schneider, supra,* 308 U. S. at 164, where the "liberty to communicate with the residents of the town depends upon the exercise of the officer's discretion", the statute is unconstitutional. See also *Cantwell v. Connecticut,* 310 U. S. 296 (1940).

Conversely stated, the "expanded" version of the exemption power fails the test in *Hynes, supra,* 425 U. S. at 617:

> "A narrowly drawn ordinance that does not vest in municipal officials the undefined power to determine what messages residents will hear may serve these important [governmental] interests without running afoul of the First Amendment."

The fact that a permit is not technically required in advance under §103D does not change this result. An organization must conform to the statute whenever it solicits funds, and, in any event, there is little difference between a "permit" and a "registration approval".[16] This Court will not force groups to act at their peril, or even to hold their rights in abeyance while the Secretary rules on their exemption request.

> "Stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; man may the less be re-

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[15] Of course, we mean "unguided" in the advocacy and informational activity sense. Respondent has repeatedly pointed out that as to the *ability to raise funds*, the Secretary's decision is guided. Unforunately, that is the wrong criterion under *Schaumburg*.

[16] See Note 10, *supra*.

> quired to act at his peril here, because free dissemination of ideas may be the loser." *Smith v. California*, 361 U. S. 147, 151 (1959), quoted in *Hynes, supra*, at 620.

Statutes that confer excessive discretion on officials, like § 103D, at best tend to produce both arbitrary enforcement and judicial determination. At worst, they present a great danger that hostility to the views expressed or represented by the actor will be a major factor in the enforcement decision. Thus, the mere existence of a vague statute, with its standardless exemption, can serve as a vehicle for content-based restrictions on First Amendment freedoms, regardless of the fact that the statute is facially content-neutral. *NAACP v. Button, supra.*

> "The existence of such a statute, which lends itself to harsh and discriminatory enforcement by local officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill v. Alabama*, 310 U. S. 88, 97 (1940).

It bears repeating that it is the mere *existence* of a vague or excessively discretionary statute that is repugnant to the First Amendment, not whether it has actually been abused. This is the "chilling effect" doctrine: a statute that would be sufficiently precise in a non-First Amendment context is excessively discretionary within that context, because of the possibility that borderline expression will be curtailed for fear that one would be within the statute's proscription, and therefore subject to the pain and expense of prosecution, or at least the expense of proving that one's expression was indeed protected.

In other words, the mere existence of such discretion results in the danger that unguided officials will tend to engage in arbitrary or censor-like enforcement, so that the statute becomes a *de facto* content-based regulation. We do not, of course, imply that the Secretary has or will engage in such enforcement.[17] However, actual abuse of the power is not the true danger. Again from *Thornhill, supra*:

> "[Local discretion] is pernicious not merely by reason of the censure of particular comments, but by reason of the threat to censure comments. . . . It is not merely the sporadic abuse of power by the censor but the pervasive threat *inherent in its very existence* that constitutes the danger to freedom of discussion." 310 U. S. at 97 (emphasis supplied).

In *Cantwell, supra*, charitable solicitors were convicted under a state statute requiring approval for such solicitation. This Court held that the discretion vested in enforcement officials rendered the statute invalid as a restraint on the free exercise of religion. 308 U. S. at 305. The opinion in *Schaumburg* expressly acknowledged that *Cantwell* also applies to "interests protected by the First Amendment's guarantee of freedom of speech." 444 U. S. at 629.

Respondent asserts, therefore, that the complete lack of guidelines or standards due to the State's overly broad construction of the §103D would render the statute impermissibly vague in any context; *a fortiori*, the statute is unconstitutional in a First Amendment context, where

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[17] There is no reason to doubt the statement that ". . . exemptions have been freely granted." *Br. of Pet.* at 24.

even greater specificity is required. *Hynes, supra,* 425 U. S. at 620.

It could be objected that the infirmities of overbreadth and vagueness leave the states with no way to regulate charitable solicitations. Rigid limitations, while sufficiently precise, will always be overbroad, as in *Schaumburg.* Placing exemptions in the statute, to be administered by state officials will protect some interests, but such provisions are likely to be excessively discretionary. It seems that the combination of *Schaumburg* (as to overbreadth) and *Hynes* (as to discretion) "relegates any local government interested in regulating door-to-door activities to the role of Sissyphus." *Schaumburg, supra,* 444 U. S. at 639, Rehnquist, J., dissenting.

The answer to this objection is found in *Schaumburg* itself. A state may enforce only ". . . narrowly drawn regulations designed to serve [state] interests without unnecessarily interfering with First Amendment freedoms." 444 U. S. at 637 (citations omitted).

Clearly, as we have argued, §103D cannot be transformed into a "flexible" statute by the State's broad interpretation and still adhere to the requirement of precision. To reiterate, it is no answer to the objection of overbreadth to create excessive discretion in the hands of a state official, for such an answer is itself objectionable.

Respondent does not argue that the State of Maryland cannot regulate in this area. The argument is that any statute, to be able to regulate solicitation, must be narrowly and precisely drawn. It must establish substantive guidelines for the Secretary of State (not merely fundraising ability standards, or accounting standards) to enable her to properly exempt those organizations

whose activities are protected, but it cannot leave excessive discretion in her hands. It may be possible to create an exemption power that would meet this burden, however, the Maryland legislature certainly did not do so.

In fact, it is absurd to suggest that the State's expanded exemption power in §103D even approaches this level of precision. It is, in fact, excessively discretionary. It amounts to the circularity of a rule stating that the Secretary may grant an exception if the organization is entitled to one.

The State argues that such discretion, by allowing exemptions to many groups, promotes First Amendment interests. Respondent disagrees. The power to grant an exemption carries with it the power to deny one. Therefore, whether read narrowly or broadly, the exemption power does not save §103D from unconstitutionality.

CONCLUSION

For all of the reasons set forth herein, the decision of the Court of Appeals of Maryland, holding Article 41, Section 103D of the Maryland Code unconstitutionally overbroad under the First and Fourteenth Amendments, should be affirmed.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
OCT 5 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF STATE OF MARYLAND,
Petitioner,

v.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

REPLY BRIEF OF PETITIONER

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No. 82-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF STATE OF MARYLAND,
Petitioner,

v.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

REPLY BRIEF OF PETITIONER

INTRODUCTION

Both Respondent Munson, a commercial fundraiser, and the amici on behalf of certain charitable organizations, urge that this Court's decision in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) accords the fundraising activities of such organizations constitutional immunity from state regulation. *Schaumburg* does not so hold; were it to be extended, the states would be rendered incapable of discharging their unique *parens patriae* responsibility for assuring the integrity and public service character of charitable organizations. The manner in which Maryland has chosen to discharge this

responsibility clearly offends no First Amendment rights of Munson and has not been shown to impinge upon the First Amendment rights of the Fraternal Order of Police or any other charitable organization. Specifically, as will be demonstrated within, the Maryland statute is neither substantially overbroad nor does it confer too much discretion on state officials in violation of the First Amendment.

I.

MARYLAND'S PERCENTAGE LIMITATION ON FUND-RAISING COSTS OF CHARITIES IS NOT SUBSTANTIALLY OVERBROAD.

Whether regarded as a question of standing[1] or as a "merits" determination of the permissible reach of a

[1] There is no dispute Munson has suffered and will suffer a distinct "injury in fact" (*i.e.*, economic loss if one of the charities with which it contracts is denied a waiver and so is unable to pay fundraising fees in excess of 25% of income and possible prosecution if it overcharges in the absence of an exemption), and so Munson has Article III standing to challenge the statute. Only a lack of Article III standing mandates dismissal of certiorari as improvidently granted. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471-72 (1982). Amici's suggestion to the contrary is illfounded; the cases upon which they rely in fact demonstrate that when this Court has dismissed for lack of standing, it was because of lack of Article III, not prudential, standing. *See Princeton University v. Schmid*, 455 U.S. 100, 102-103 (1982); *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952). Where, as here, there is sufficient "injury in fact" to confer Article III standing, this Court has routinely gone on to determine if there is sufficient overbreadth standing. *See, e.g., New York v. Ferber*, 102 S. Ct. 3348, 3360-63 (1982). This is clearly the correct result. Otherwise, the very lack of merit of a party's overbreadth standing will result in placing the erroneous constitutional analysis by the court below beyond the review of this Court; "only through this process of review [may the Court] correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents. . . ." *Id.*

statute,[2] the principal question to be decided in this case is: whether Article 41, § 103D of the Maryland Code is facially overbroad. Respondent Munson, a "professional fundraiser counsel" Maryland Code, Article 41, § 103A(g), asserts that it is. Accordingly, the firm urges this Court, without inquiry into the actual operation of the statute, to summarily condemn Maryland's effort to deal with the serious social problems created by charitable fundraising. In most areas of the law, claims such as those advanced here which are unsupported by a factual showing would not be entertained. Although this Court has recognized an exception to this salutary principle, where a statute is challenged as overbroad on First Amendment grounds, that exception is applicable only in the case of an egregious infringement on the right of free speech.[3] For

[2] Determinations as to overbreadth — both standing and merits challenges — involve precisely the same considerations. At the very least, "a party's standing to assert overbreadth should be dependent on the same factors which determine whether the challenged statute should be invalidated on its face or not." Note, *First Amendment Overbreadth Doctrine* 83 Harvard L. Rev. 844, 909 (1970). *See e.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

[3] The Court has also permitted such an exception "where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves." *Broadrick v. Oklahoma, supra*, 413 U.S. at 611. As demonstrated in the Brief of Petitioner at 21-23, Munson has no such "*jus tertii*" standing to assert the rights of the Fraternal Order of Police (FOP). First, the FOP is clearly capable of asserting its own rights. If the FOP was truly afraid of the publicity of litigation, it would not allow its name to be bandied about in the case at hand. Moreover, the mere existence of the challenged statute (with its waiver provision) does not "ensure" the rights of the FOP will be violated. Indeed, there is nothing in the record of this case which demonstrates that the FOP's speech or advocacy interests were in any way hurt by the challenged statute. All that the parties stipulated to was that the FOP was engaged in some advocacy and that it was "reluctant to enter into a fundraising contract with Munson in light of the statute." There is no stipulation with regard to the extent of the FOP's "reluctance" *or* the connection between its

example, this Court has expressly recognized that the overbreadth doctrine is "strong medicine" and so directed:

> "[W]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. at 615.

However, Munson claims the *Broadrick* "substantial overbreadth" test was rejected by this Court in *Schaumburg*, and is not applicable here. Brief of Respondent at 21.

Munson is wrong on both counts. First, this Court, in *Schaumburg*, in fact applied the substantial overbreadth test, expressly recognizing that "[s]oliciting financial support is undoubtedly subject to reasonable regulation," 444 U.S. at 632, and so such a regulation will be struck down only if it "*substantially* abridges First Amendment rights of other parties not before the Court." 444 U.S. 634 (emphasis added). It was only because the *Schaumburg* ordinance was found to be such a "direct and substantial limitation on protected activity," that it was invalidated. 444 U.S. at 636. Moreover, while in *Schaumburg* and the other charitable solicitation case upon which Munson relies, *e.g., Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610 (1976), the condemned regulations were directed at door to door solicitation which is almost inevitably "intertwined with" the communication of information, the advocacy of causes, and/or the propagation of views and ideas, § 103D is not so directed.

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advocacy activities and the fundraising activities at which § 103D is directed. Thus, the State does not challenge the stipulation filed below, but only points up its enormous limitations. Finally, Munson can point to no case of this Court where a litigant was permitted to press a facial overbreadth claim on behalf of third parties solely on the basis of *jus tertii* standing. Even if Munson had "*jus tertii*" standing here, it would still have to demonstrate the overbreadth of § 103D in order to prevail.

Rather, the Maryland statute is directed at fundraising, pure and simple, and encompasses many types of conduct that are far removed from advocacy or the dissemination of ideas.[4] Thus, here it is clear both that Munson must prove substantial overbreadth and that this burden is more difficult than it was in *Schaumburg*.

In order to prove substantial overbreadth, Munson, at the very least,[5] must demonstrate that the statute "reaches a substantial number of impermissible applications." *New York v. Ferber*, *supra*, 102 S. Ct. at 3362.

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[4] *See, e.g.*, the allegations in Munson's Amended Complaint (Munson "engaged in the promotion business, providing advice to various organization clients desiring to promote entertainment events for profits; Munson's "sole contracts in . . . Maryland" are with the FOP; Munson's "activities are *limited to* advising its clients [the FOP] as to how to go about promoting a particular entertainment event") (A. 21). (References to the Appendix to the Petition for a Writ of Certiorari are cited as "APC" and references to the Joint Appendix as "A"). *Compare* the uncontroverted allegations in CBE's Amended Complaint in *Schaumburg* (CBE endeavored "to distribute literature on environmental topics and answer questions of an environmental nature when posed; solicit contributions to financially support the organization and its programs; receive grievances and complaints of an environmental nature," 444 U.S. at 625).

[5] It is not at all certain that a party such as Munson can ever demonstrate § 103D is substantially overbroad. Several authorities have suggested that in order "[to] challenge a statute as . . . overreaching, a litigant must still be one as to whom . . . it *may* overreach." Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 101 (1960) (emphasis added); Schutter, *The Invalidation of Statutes For Hypothetical Unconstitutionality: A Tale of Two Absurdities*, 7 Ariz. L. Rev. 252, 256 (1966) ("[T]hose complaining of the overbreadth . . . were the same ones who were at least hypothetically threatened. . . .") If that test is applied here, it is clear without further analysis that the Maryland statute is not overbroad as to Munson. For, unlike the Citizens for Better Environment in *Schaumburg*, which, although it did not *prove* that it was unconstitutionally infringed by the statute, was theoretically a group which *might* have been harmed by the statute, Munson, a professional fund-raiser, is not even theoretically a group whose speech *might* be harmed by the Maryland statute.

Munson's principal attempt to meet this burden is to urge this Court to simply find the group identified as burdened in *Schaumburg* also burdened here. This argument totally ignores: (1) the critical differences between the *Schaumburg* ordinance and § 103D and (2) the record in this case.

The "class" of organizations which the *Schaumburg* Court identified as unconstitutionally burdened by the Village ordinance were charitable organizations "whose primary purpose" was "not to provide dollars or services for the poor . . . but to gather and disseminate information about and advocate positions on matters of public concern." 444 U.S. at 635. Munson asserts that "[e]ssentially" this class is also unconstitutionally burdened by § 103D. Brief of Respondent at 23. However, this Court in *Schaumburg* did not find this "class" of advocacy organizations burdened by the challenged ordinance because their fundraising expenses were unduly limited. In fact, the fundraising expenses of the Citizens for a Better Environment were not higher than permitted by the ordinance; it actually spent *less* than 25% of its income on fundraising expenses and so if fundraising expenses alone had been subject to limitation, as they are here, the Citizens would have had no difficulty complying with the ordinance. Indeed, as to pure fundraising expenses, the *Schaumburg* Court specifically noted the "75 percent limitation" in the ordinance might be enforceable "where solicitors" were "mere conduits for contributions. . . ." 444 U.S. at 635.

Rather, the *Schaumburg* Court's attention was primarily focused on the inflexible limitation the ordinance placed on "salaries and administrative expenses" of advocacy groups. 444 U.S. at 635 and 636. As the Court explained, although advocacy groups "might pay only reasonable salaries" they "would necessarily spend more of their budget on salaries and administrative expenses,"

to pay "staff to carry out" the organization's "research, advocacy or public education" functions "as well as to solicit financial support." 444 U.S. at 635-37. Of course, under § 103D there is no limitation on the amount of administrative expenses an advocacy organization, or any other charitable organization, may incur; it is only a charitable organization's fundraising expenses that are limited — and even then feasibility or planning studies are excluded from the limitation. The findings of the *Schaumburg* Court as to the particular burden on advocacy groups caused by limitations on their administrative expenses thus have no application in the case at hand. Perhaps recognizing this, Munson briefly attempts to expand the allegedly burdened class and to describe it to include those advocacy groups who espouse unpopular causes and because of this, must "logically" have particularly high fundraising costs. Brief of Respondent at 23. But there is no finding by the court below that this was so, nor is there anything in the record which supports this assertion. Thus, Munson simply has not demonstrated that Maryland's percentage limitation on fundraising activities "reaches" the class of advocacy organizations described in *Schaumburg* or any other group.

However, even if Munson were able to show that an identifiable "class" of charitable organizations did necessarily incur fundraising expenses in excess of 25%, this would not be sufficient to prove that § 103D "could not constitutionally be applied" to this class. *Village of Schaumburg v. Citizens for Better Environment, supra* at 635. This is because any charitable organization, including an advocacy group, may ask the Secretary of State for a waiver[6] from the 25% limitation. The Secretary will

[6] Contrary to Munson's assertions, the court below did not authoritatively construe this waiver provision as so extremely narrow as to be inflexible. All that the Maryland Court did was *characterize* as extremely narrow the statutory language

grant a waiver if it is demonstrated that an exemption is "necessary to the accomplishment of the organization's charitable purpose" and that "there is no other reasonable alternative." COMAR 01.02.04.05B. The record of applications for waivers clearly demonstratres that these standards have been adequate to provide the Maryland fundraising limitation with the flexibility which this Court specifically found wanting in the *Schaumburg* statute. To wit, the waiver regulations allow an organization unable to meet the percentage limitation an opportunity to demonstrate that its fundraising costs are nonetheless necessary.[7] Indeed, The Report of Secretary of State of Maryland lists only 14 organizations that found it necessary to apply for a waiver of the 25% fundraising limitation; all but one, the Howard County Firefighters Lodge 2000, were granted the waiver. (The Firefighters

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authorizing the Secretary of State to promulgate exemption regulations. APC. at 20-21. By such a characterization, the lower court cannot compel "an overbreadth attack when not required to do so by the Constitution." *New York v. Ferber, supra*, 102 S. Ct. at 3360. Moreover, the statutory language authorizing regulations speaks for itself:

> The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions. [Art. 41, § 103D(a).]

Of course, any regulations promulgated under this authority are limited in that they may only pertain to "those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions." However, as demonstrated in text, the regulations that have been promulgated are both within the statutory authorization and adequate to provide the flexibility missing in *Schaumburg*.

[7] Since a charity can choose the period in which a precentage limitation is in effect and apply it retrospectively on an annual or on a campaign-by-campaign basis, COMAR 01.02.04.05A, the Maryland law also allows the charity an opportunity to alter its spending patterns from year to year as the *Schaumburg* ordinance did not.

Lodge never submitted the requested additional information to the Secretary.) Significantly, every waiver sought by lodges of Fraternal Order of Police has been granted; and none of the well known charities represented by the amici have even found it necessary to apply for a waiver. *See* Brief of Petitioner, Exhibit B. Surely, if the limitation or waiver provisions had caused the slightest inconvenience, that inconvenience would have been dramatized by the briefs presented to this Court.

Munson, however, maintains that the waiver provision does not effect the alleged overbreadth of § 103D because it is not related to "the nature of the organization or to the type of activity it engages in. . . ." Brief of Respondent at 25. Munson is correct that the waiver provision in § 103D has "no relation" or at least no direct relation to the "advocacy nature of an organization;" if it did, it well might be constitutionally suspect. What the waiver provision in § 103D relates to is what § 103D itself regulates — the fundraising expenses of charitable organizations. However, Munson is incorrect in maintaining that the waiver provision has no effect on the alleged overbreadth of § 103D. If, as Munson argues, advocacy groups in general, and particularly those espousing unpopular causes, truly do have the most difficulty raising funds, then the waiver provision is indeed particularly helpful to them. For such groups will be those most easily able to demonstrate that the 25% limitation "effectively prevents" them "from raising contributions," and so obtain an exemption from it.

Thus, while in *Schaumburg*, there was an entire class of charities to whom the statute "could not constitutionally be applied," that is, as demonstrated above, simply not the case here. Rather, the situation here is similar to that in *New York v. Ferber, supra*, where, this Court, while recognizing that the challenged state statute might arguably have impermissible applications, found them to

be no more than "a tiny fraction of the materials within the statute's reach." 102 S. Ct. at 3363. We submit that the record of the case similarly demonstrates that if § 103D has impermissible applications, (none have been demonstrated and we do not concede that there are any), they are but a "tiny fraction" of the total number of organizations within the statute's reach.[8]

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[8] Munson concedes that "there is no doubt that the interests asserted by the State . . . are sufficiently strong," but claims the "real issue" is whether the Maryland statute furthers those interests "substantially" so as to justify the alleged "great burden on First Amendment rights." Brief of Respondent at 37, n. 13. As demonstrated in the text above, the burden on First Amendment rights here, if it exists, is hardly "great." In such a case, this Court has recognized that even though there may be another approach that properly accommodates [the State's] interest, it does not follow that the First Amendment prohibits the State from going further" to protect its interests. *New York v. Ferber, supra*, 102 S. Ct. 3356. *See also Buckley v. Valeo*, 424 U.S. 27-29 (1976) (limitation on individual political contributions upheld even though fraud was also addressed by disclosure requirements). Moreover, it is in any event clear that § 103D does "substantially" further the State's interest in preventing fraud and seeing that charities are properly administered in two ways: (1) by protecting charitable donors and beneficiaries by insuring that a reasonable proportion of donor's contributions actually reach their intended beneficial objects and (2) by protecting the charities themselves by promoting the public's perception of integrity and efficiency with which charitable funds are raised. The ACLU errs in contending that the State's *parens patriae* power to see that charities are properly administered, *see Girard v. City of Philadelphia*, 74 U.S. (7 Wall.) 1, 14-15 (1869), is limited to "traditional charities," *i.e.*, "institutions to help the poor, sick and aged," ACLU Brief at 16. Not even the Statute of Charitable Uses was so limited; it also applied to "schools of learning, . . . scholars in universities; . . . [and] help of young tradesmen. . . ." Preamble, 43 Elizabeth, ch. 4 (1601). Moreover, in Maryland, the Statute of Charitable Uses, adopted in principle by Estates & Trust Article § 14-301(a) and (b), has been recognized as potentially justifying suits by the Attorney General to enforce the terms of charitable trusts designed to benefit the *public generally*. *See Gordon v. Mayor of Baltimore*, 258 Md. 682, 712, 267 A.2d 98, 114 (1970) (trust to establish

Furthermore, there are a number of other reasons why Munson cannot show real and substantial overbreadth in § 103D and why whatever overbreadth is alleged to exist is readily cured through case-by-case analysis of individual fact situations. *See Broadrick v. Oklahoma, supra*, 413 U.S. at 615-16. First, the statute itself contains a device to facilitate case-by-case analysis of a charity's assertions of overbreadth. An organization can easily apply for an exception to the 25 percent limitation. If such an exception were to be rejected, a charity would have the right of judicial review. Maryland Code, Article 41, Section 255. Second, § 103D imposes no prior restraint and permits a charity exceeding the percentage limitation to apply for an exception after-the-fact. These factors are particularly relevant because overbreadth scrutiny is less rigid when a court is dealing with a "noncensorial" statute, *Broadrick v. Oklahoma*, 413 U.S. 601, 614 (1973), and because in determining "substantial overbreadth," the penalty to be impoed by the statute is relevant. *New York v. Ferber, supra*, 102 S. Ct. at 3363 (1982). Third, the record does not identify a single "cause" alleged to be advocated by Munson's clients, or whether the firm's solicitations have ever mentioned such issues.[9] Nor does it disclose whether Munson's clients funded these asserted advocacy activities by such exempted items as membership dues.

In short, the Maryland statute that is challenged here predominantly impacts constitutionally unprotected conduct rather than free speech and has not been shown to

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cultural institute); *Mayor of Baltimore v. Peabody Institute*, 175 Md. 186, 192, 200 A. 375, 378 (1938) (trust to establish public park).

[9] The Attachment to this Brief contains a recent mail solicitation for the Maryland State Lodge of the Fraternal Order of Police that avoids mentioning any of the activities, advocacy or otherwise, of the organization. ("Should you have any questions concerning our organization, its policies or activities, I would be happy to answer them. . . .")

have any impermissible applications that offend the First Amendment. Accordingly, it should not be invalidated as overbroad.

II.

THE WAIVER PROVISION DOES NOT VEST EXCESSIVE DISCRETION IN THE SECRETARY OR OTHERWISE VIOLATE THE FIRST AMENDMENT.

The waiver provision in § 103D provides:

> "The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fundraising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions."

After arguing at some length that this provision is "narrow", "very narrow" and "very limited and strictly defined," Brief of Respondent at 25, 26, 28, 29 and 38, Munson attempts to argue "alternatively" that it places "excessive" and "unguided discretion" in the hands of the Secretary and for this reason violates the First Amendment. Brief of Respondent at 42-43.[10]

[10] Munson maintains that this argument has been made at each stage of the proceedings below. In fact, neither the Bill of Complaint nor the Amended Bill of Complaint alleged that the waiver provisions of § 103D violated the First Amendment as conferring too much discretion on State officials. They challenged this feature of the law only as "an improper delegation of legislative authority," — a separation of powers, *see Yakus v. United States*, 321 U.S. 414 (1944), or due process claim, *Tighe v. Osborne*, 149 Md. 349, 131 A. 801 (1925), not a First Amendment contention (A. 24-26). In a post-trial memorandum, filed July 1, 1980, Munson did say in a First Amendment context: "What is more, we urged and we urge that even if the Maryland exception is to be read more broadly than we think permissible, that such regulation is overbroad and an improper placement of discretion in the issuance of exceptions." Plaintiff's Memorandum of Law at 10. This belated argument was ignored by the trial court whose opinion issued the following day.

It must be noted at the outset that this is a peculiar, if not impossible, claim for Munson to make. Section 103D provides only that the Secretary of State shall issue rules permitting "a charitable organization" to pay fundraising expenses in excess of 25%. Munson is not a charitable organization; it can never apply for the waiver. Nor can Munson legitimately assert the claims of the FOP. *See* n.3 *supra*. For these reasons, the State submits that Munson's excessive discretion claim[11] can and should be summarily rejected.

This claim is, in any event, meritless. The discretion given the Secretary under § 103D is very different in both degree and kind from that condemned in the cases relied upon by Munson. First, § 103D provides a clear standard permitting the Secretary to exercise her discretion to grant a waiver from the 25% of fundraising expense limitation only "in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions." Moreover, here, in

[11] Munson repeatedly maintains that the waiver provision in § 103D is impermissibly "vague." Clearly, the Respondent made no "fair notice" argument below and does not make one here. *See Zwickler v. Koota*, 389 U.S. 241, 249 (1967) (A statute is void for vagueness "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application. . . .") Rather, the firm argues that § 103D is vague because it vests "excessive" discretion in State officials. In the First Amendment context, this has been sometimes characterized as overbreadth, *see Broadrick v. Oklahoma, supra* 413 U.S. at 613, (Facial overbreadth claims have been entertained where communicative conduct "has required official approval under laws that delegated standardless discretionary power to local functionaries . . ."); and other times as vagueness, *see Hynes v. Mayor and Council of Borough of Oradell, supra*, 425 U.S. at 622, (An ordinance was struck down as vague in part because it did not "'provide explicit standards for those who apply' it.") However, no matter what label is placed on Munson's assertions of "too much discretion," for reasons detailed above, it is clear that the argument is utterly without merit.

contrast to those cases where the court has found excessive discretion, "the agency charged with enforcement," the Secretary of State, has "adopted . . . regulations that . . . give more precise meaning" to the statute. *Cf. Hynes v. Mayor and Council of Borough of Oradell, supra*, 425 U.S. at 623-24, n.6.[12] Pursuant to these regulations, the Secretary is confined to determining that the 25% limitation effectively prevents the organization from raising contributions in those instances when it is demonstrated that an exemption is "necessary to the accomplishment of the organization's charitable purpose" and that "there is no other reasonable alternative." COMAR 01.02.04.05B.[13]

In addition, the statute and regulations promulgated pursuant to it do not authorize scrutiny of an organizatin's charitable purpose, but instead require a neutral assessment of whether fundraising expenses in excess of 25% limitation are "necessary" to its accomplishment, and whether "reasonable alternatives," compatible with that purpose, do or do not exist. Thus, the Secretary is not given "the undefined power to determine what messages residents will hear." *Hynes v. Mayor and Council of Borough of Oradell, supra*, 425 U.S. at 617. Indeed, the statute and regulations do not give the Secretary any discretionary authority in most instances; a charitable organization has an absolute right to solicit for funds as long as its fundraising costs are 25% or less of its total income. It is only when this limit is exceeded that the Secretary exercises any discretion at all.

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[12] The statute also has a history of "less formalized custom and usage," *Parker v. Levy*, 417 U.S. 733, 754 (1974) which further defines the discretion granted the Secretary. *See* Brief of Petitioner, Exhibit A, Report of the Secretary of State at 6.

[13] Moreover, the Secretary's determination as to whether to grant or deny a waiver is subject to judicial review. Maryland Code, Article 41 § 255.

Moreover, the Secretary is not permitted to use even her limited discretion to impose a prior restraint on fundraising. A charity need not request the waiver *prior* to incurring fundraising expenses in excess of 25% of its income; rather it may incur the excessive expenses and then request an exemption retrospectively. COMAR 01.02.04.05A and 01.02.04.05B(3). Indeed, a charity that has spent more than 25% on fundraising expenses need not even obtain a waiver prior to engaging in further fundraising, it simply must have *requested* one. COMAR 01.02.04.05B(3). In contrast, the excessive discretion cases upon which Munson relies all involve some sort of prior restraint, which this Court focused upon and specifically disapproved. *See Hynes v. Mayor and Council of Borough of Oradell, supra*, 425 U.S. at 622 ("To the extent that these ambiguities and the failure to explain what 'identification' is required give police the *effective* power to grant or deny permission to canvass for political causes, the ordinance suffers in its practical effect from the vice condemned in *Lovell, Schneider, Cantwell,* and *Staub.*"); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) ("[T]he availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible."); *Schneider v. State*, 308 U.S. 147, 164 (1939) ("[A] municipality cannot . . . require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval. . . ."); *Lovell v. Griffin*, 303 U.S. 444, 451-52 (1938) ("While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision.")[14]

[14] Two additional cases cited in this section of Munson's brief dealt not with excessive discretion but with statutory vagueness. *See N.A.A.C.P. v. Button*, 371 U.S. 415, 435-36 (1963); *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940).

Finally, any interested party, who is confused or uncertain as to the scope or meaning of any of the rules promulgated by the Secretary may, under Maryland law, request a declaratory ruling from the Secretary. Maryland Code Article 41, § 250; COMAR 01.02.03.04; 01.02.04.07. Indeed, such a party may petition the Secretary to promulgate, amend, or repeal any rule. Maryland Code, Article 41 § 248; COMAR 01.02.03.03. A party is entitled to a hearing before the Secretary complete with notice and legal representative on any of these matters. Thus, as in *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 580 (1973), a procedure has been established by which an interested person "in doubt about the validity of a proposed course of conduct may seek and obtain advice from the [Secretary] and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the [Secretary] is concerned."

Accordingly, we submit that it is as clear here as it was in *Broadrick v. Oklahoma*, *supra*, 413 U.S. at 607, that "it is all but frivolous to suggest that [the statute] fails to . . . set out 'explicit standards' for those who must apply it."

CONCLUSION

For all of the reasons set forth within and in the Brief of Petitioner, the decision of the Court of Appeals of Maryland should be reversed and remanded for entry of a declaration that Section 103D of Article 41 of the Maryland Code is not substantially overbroad in violation of the First Amendment.

Respectfully submitted,

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I am proud to announce that for the first time the FRATERNAL ORDER OF POLICE, MARYLAND STATE LODGE, INC. is offering booster memberships to the citizens of this State. Now, more than ever, we need your help and support.

To become a Booster Member, just tear off your personalized membership card and send back the remittance form with your check for $10.00, payable to the F.O.P. MARYLAND STATE LODGE, INC. in the enclosed envelope.

To acknowledge your support, I am enclosing a 1983 Booster Decal. I hope you will proudly display our symbol on your door, window or vehicle. Additional decals are available to booster members for only $5.00.

Upon our receipt of the remittance form and your check, you will be added to our list of concerned citizens in the State of Maryland. Your assistance will help defray the costs of the many needs for our membership representing 43 Lodges, totaling 8,000 members and still growing. The Maryland State Fraternal Order of Police is run solely by active and retired Police Officers. Should you have any questions concerning our organization, its policies or activities, I would be happy to answer them at the above address or call 474-1700.

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Sincerely

Thomas P. Lennon
8th President

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No. 82-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF STATE OF MARYLAND,
Petitioner,

v.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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SECRETARY OF STATE OF MARYLAND,
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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI[1]

The American Civil Liberties Union ("ACLU") is a nationwide organization of over 200,000 members. It was founded over 60 years ago to preserve and protect the fundamental principles of the Bill of Rights. The ACLU of the National Capital Area is the Washington, D.C. affiliate of the ACLU. Both *amici* engage in fund raising in the State of Maryland.

The ACLU's interest in this case stems from the organization's longstanding concern to protect the rights secured by the First Amendment, and from the possibility that the Maryland statute challenged here may, as inter-

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[1] Letters from the attorneys for Petitioner and Respondent expressing their consent to the filing of this brief are filed herewith.

preted by Petitioner, restrain the ACLU's own fund-raising efforts.

STATEMENT

At issue here is the constitutionality under the First and Fourteenth Amendments, of a Maryland statute prohibiting "charitable organizations" from incurring fund-raising expenses which exceed 25 percent of the funds collected.

The Respondent, Joseph H. Munson Company, Inc. (hereinafter "Munson"), raises funds for various chapters of the Fraternal Order of Police, an organization engaged in the "dissemination of information and the advocacy of causes on behalf of police officers." Pet. App. 39a.[2] The Maryland Court of Appeals held that Munson was threatened with injury because the Montgomery County, Maryland, chapter of that organization "would not contract with Munson" and the Petitioner "would seek prosecution of Munson," because the contracts Munson proposed exceeded the 25-percent limitation. Pet. App. 11a.[3] Munson brought suit against the Petitioner,

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[2] "Pet. App. ——" refers to the appendix to the petition for certiorari filed in this case. "Pet. Br." refers to Petitioner's Brief, and "Amici Br." to the brief of nine States as *amici* for Petitioner.

[3] The court held that Munson had standing to sue because it "has clearly suffered injury," *id.*, and was entitled to assert the First Amendment rights of the Fraternal Order of Police because the "statute is directed at persons with whom the plaintiff has a business or professional relationship, and impairs the plaintiff in that relationship." *Id.*, citing, *inter alia*, *Craig* v. *Boren*, 429 U.S. 190, 194-97 (1976); *Singleton* v. *Wulff*, 428 U.S. 106, 112-18 (1976); *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535-36 (1925); *Baltimore* v. *A.S. Abell Co.*, 218 Md. 273, 281-82, 145 A.2d 111, 115 (1958). Indeed, this Court has conferred standing upon litigants to challenge state laws when the mere possibility of future enforcement of those laws threatened the constitutional rights of the litigant or of persons with whom the litigant did business. *Craig* v. *Boren*, 429 U.S. at 194-97; *Doe* v. *Bolton*, 410 U.S. at 188-89; *Pierce* v. *Society of Sisters*, 268 U.S. at 535-36. More-

seeking a declaratory judgment and an injunction against enforcement of the 25-percent limitation, alleging violation of the First and Fourteenth Amendments.

After a hearing upon a stipulated record, the trial court dismissed Munson's action and the Maryland Court of Special Appeals affirmed, but the Court of Appeals of Maryland reversed and directed the entry of judgment for Munson.

The case is here on petition for certiorari granted January 10, 1983.

1. *The Decision Below.*

The Maryland Court of Appeals held unanimously that the State's statutory scheme violates the First and Fourteenth Amendments, under *Village of Schaumburg* v.

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over, the requirement of substantial overbreadth created by this Court in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-18 (1973) is inapplicable here because the activities of Munson on behalf of the Fraternal Order of Police are precisely those advocacy-related solicitations which this Court found to be entitled to full First Amendment protection in *Village of Schaumburg* v. *Citizens for Better Environment*, 444 U.S. 620, 635-36 (1980).

Finally, if this Court determines that Munson has no standing here, then it should simply dismiss certiorari as improvidently granted. *Doremus* v. *Board of Education*, 342 U.S. 429, 434 (1952); *Federation of Labor* v. *McAdory*, 325 U.S. 450, 471 (1945); *Tyler* v. *Judges of Court of Registration*, 179 U.S. 405, 414 (1900). These cases stand for the proposition that when a state court decides the merits of a federally-based challenge to a state law, this Court must simply allow the decision to stand if it finds that it cannot decide the dispute because of a lack of standing or other related concerns. As Justice Rehnquist stated in his role as Circuit Justice for the Ninth Circuit, "The courts of a state are free to follow their own jurisprudence as to who may raise a federal constitutional question, but this Court in reviewing a state-court judgment is bound by the requirements of case and controversy and standing associated with Article III of the United States Constitution." *Bateman* v. *Arizona*, 429 U.S. 1302, 1305 (1976).

Citizens for Better Environment, 444 U.S. 620 (1980). The Maryland court found the essential teachings of *Schaumburg* to be: (1) that charitable solicitations, like religious solicitations, are protected by the First Amendment; (2) that a percentage limitation on fund-raising costs is a direct and substantial limitation on protected speech; and (3) that such limitations are contrary to the First Amendment's requirement that speech restraints must be narrowly drawn to serve "a strong, subordinating interest" of government, and be the least restrictive means of achieving that intent. Pet. App. 14a-15a.

The Maryland court concluded that the percentage limitation at issue here is not carefully drawn to serve the State's asserted purpose of preventing fraud, that it interferes with nonfraudulent activities, and that there are other ways to control fraud that do not unduly infringe First Amendment rights. Pet. App. 19a. The court relied upon this Court's observation in *Schaumburg* that, because of the variable circumstances facing charitable organizations, many expend more than 25 percent of their receipts for administrative and solicitation expenses, and may not on that account be labelled "fraudulent" by a governmental body. Pet. App. 15a, citing 444 U.S. at 636-37. It pointed to this Court's conclusion that "legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation," such as (1) the direct prohibition of, and punishment for, fraudulent representations; and (2) requirements for the disclosure of the finances of charitable organizations. Pet. App. 15a, citing 444 U.S. at 637-38.

The court below rejected the State's claim that Maryland's law is saved from constitutional infirmity because the statute delegates power to the Petitioner to waive the 25-percent limitation upon a finding that the limitation "would effectively prevent the charitable organization from raising contributions." Md. Ann. Code art. 41

§ 103D(a) (Supp. 1982).[4] The court held that (1) the Petitioner's authority to issue regulations and grant waivers is impermissibly vague, and (2) the exemption is "extremely narrow" insofar as it is limited to cases of necessity, whereas in *Schaumburg* "the Court clearly indicated that charitable organizations making a policy decision to use more than 25 percent of the proceeds raised for purposes other than 'charitable' had a constitutional right to do so." Pet. App. 20-21a, citing 444 U.S. at 637.

Finally, the court concluded that the criminal penalty is not a penalty for fraud at all:

> "[I]f one fails to meet the 25 percent expense limitation . . . and has not obtained a permit from the [Petitioner] waiving the limitation, he is criminally liable regardless of whether he had made fraudulent misrepresentations." Pet. App. 19a.

Thus, the court held, the statute is in no sense a prohibition against fraud; it is simply a strict limitation on the funds that an organization may expend in fund raising.

2. *The Maryland Statute.*

The percentage limitation at issue here is part of Maryland's Charitable Organizations Law, which embodies a series of regulatory controls over "benevolent, philanthropic, humane, patriotic, religious or eleemosynary" organizations that solicit funds from the public for "charitable purposes." § 103A. Petitioner's regulations define "charitable purpose" as including "religion, health, education, social welfare, arts and humanities, and civic and public interests," Code of Md. Regs. ("COMAR") 01.02.04.01G, so that virtually every form of voluntary public interest and advocacy organization is covered other than political parties, political committees, political clubs and State or local governmental agencies, which the statute specifically exempts. § 103A(b). Covered organizations are required to file registration statements with the

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[4] Subsequent statutory references are to the Md. Ann. Code art. 41 unless otherwise specified.

Secretary of State comprising complete financial records, including a balance sheet, an income and expense statement and a financial report disclosing gross income, costs and expenses of fund raising and the allocation and disbursement of gross income. § 103B(a). Such filings become public records. § 103G.

The statute prohibits charitable organizations from paying or agreeing to pay as expenses more than 25 percent of the funds contributed as a result of fund-raising activity. § 103D(a). Certain organizations, including "bona fide" religious, educational, community and civic groups are exempt from the statute's registration and disclosure requirements in specified circumstances, § 103C, but are nevertheless subject to the percentage limitation. *See* COMAR 01.02.04.02A(1).

To implement the percentage limitation, Petitioner is required (1) to establish rules and regulations for the reporting of actual costs, and accounting rules governing the allocation of expenses relating to fund raising; and (2) to issue appropriate rules and regulations, and to grant waivers allowing a charitable organization to exceed the 25-percent limitation "in those instances where the 25-percent limitation would effectively prevent [it] from raising contributions." § 103D(a).

Petitioner's accounting rules require that "expenses of public education materials and activities, which include an appeal, specific or implied, for financial support, shall be fully allocated to fund-raising expenses." COMAR 01.02.04.04A(3).

To obtain a waiver of the 25-percent limitation, Petitioner requires a showing that the waiver is "necessary to the accomplishment of the organization's charitable purpose and that there is no other reasonable alternative." COMAR 01.02.04.05B(1). The only examples of such necessity listed in the regulations are:

> "(a) When there are extraordinary, unusual, and non-recurring circumstances . . .; and (b) When an

organization is less than 2 fiscal years old and in the developmental stage." COMAR 01.02.04.05B(2).

Other provisions of the statute directly prohibit certain fraudulent representations, § 103J, and require professional fund-raiser counsel or solicitors to register with Petitioner, post a $10,000 bond, pay an annual fee of $100, and list the names of all officers, agents and employees. § 103F.

INTRODUCTION AND SUMMARY OF ARGUMENT

Like every other human institution, charitable, religious and public interest organizations have occasionally been charged with acts of dishonesty and inefficiency. But there are no studies and no data which establish that these defects are more widespread among associations of citizens voluntarily banded together in their common expressions of public service than among commercial, industrial and governmental organizations. Moreover, the press coverage of financial abuses among charities is aggressive, and there is no reason to think it is not effective.

The percentage limitations imposed by 19 States on voluntary organizations, however, reflect an attitude of suspicion and impose mechanistic tests of honesty evident nowhere else in society. Petitioner and the *amici* States admit that these statutes restrain First Amendment rights, but argue that they comply with the Constitution's requirement that any such restraint be both necessary and carefully tailored to serve compelling governmental interests.

In tacit acknowledgment that the statutes do not regulate fraud carefully or with sufficient respect for the rights of free speech, the States also argue that voluntary associations are wards of the state, subject to *parens patriae* control, by virtue of doctrine founded upon the Statute of Charitable Uses, 43 Eliz. ch. 4 (1601). Such power—to control the revenue-raising discretion of all

forms of voluntary associations, including public interest advocacy groups which are often in serious opposition to the government—clearly offends the rights of Free Speech, Free Assembly and Free Religion. The assertion of the power here is a dramatic illustration of the vagueness of the authority sought to be vested in Petitioner.

Maryland's statute, imposing a percentage limitation with a "necessity" exception, is more offensive to constitutional values than the straight percentage limitation held to violate First and Fourteenth Amendment rights in *Village of Schaumburg* v. *Citizens for Better Environment*, 444 U.S. 620 (1980). It impairs constitutional rights by submitting the solicitation efforts of religious, public interest and advocacy organizations to the subjective decision of a State official as to whether such costs are necessary to the raising of funds. Such a "necessity" exception is inadequate to protect the First Amendment rights of organizations which have made policy decisions to spend money in order to raise money to improve the fulfillment of their functions, and is therefore contrary to even the narrowest construction of *Schaumburg*. The Fifth Circuit's decision in *National Foundation* v. *Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970), which the Petitioner relies upon heavily to support its argument for reversal, is not inconsistent with the ruling of the court below; it is no longer followed by the Fifth Circuit; and its application here would be contrary to settled First Amendment principles.

With or without the waiver's authority, the statute fails the basic test for restraints on First Amendment rights. It cannot well serve any important governmental interest, since there is no evidence to support a percentage limitation as a valid method of identifying fraud. The statute's purported objectives could better be served by means less invasive of constitutional rights such as: (1) statutes aimed directly at fraudulent representations, and (2) disclosure laws that make contributors aware of how their money is being spent.

ARGUMENT

I. The Waiver Provision of Maryland's Statute Does Not Permit Accommodation of the Policy Choices of Advocacy Organizations and Delegates Impermissibly Vague Discretion to a Government Official

Petitioner's principal argument is that its 25-percent limitation on charitable fund-raising costs, which otherwise is very similar to the provision struck down by this Court in *Schaumburg*, is saved from constitutional infirmity by the "flexible" waiver provision contained in Section 103D(a), which allows a charity to exceed the percentage limitation where the limitation "would effectively prevent the charitable organization from raising contributions."[5] As authority for this argument, Petitioner cites *National Foundation* v. *Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970), which the State asserts was impliedly endorsed in *Schaumburg*. Petitioner claims that its statute escapes the ban of *Schaumburg* because it falls within the principle said to be established by the *Fort Worth* case, in which a percentage limitation on fund-raising costs, combined with a waiver provision for reasonable expenses which exceeded that limit, was found to pass constitutional muster.

This argument has no merit. Whether or not Petitioner is correct in claiming that the 1969 decision of the Fifth Circuit in *Fort Worth* is still good law after *Schaumburg*, the provision at issue here is nonetheless invalid. Its waiver provision is at once too narrow to accommodate the policy choices apparently available to voluntary associations under the Fort Worth ordinance,

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[5] Petitioner's regulations, promulgated under authority granted by the statute, authorize a waiver if the organization can demonstrate to the Secretary of State that its fund-raising expenses are "necessary to the accomplishment of the organization's charitable purpose and that there is no other reasonable alternative." COMAR 01.02.04.05B(1).

and at the same time commits unduly vague authority to Petitioner.

The Fort Worth ordinance created a 20-percent limit on charitable fund-raising expenses, but permitted the City's Commission on Charitable Solicitations to waive the limitation upon a showing by an organization that its fund-raising costs were "not unreasonable." 415 F.2d at 44 n.2. On the other hand, in Maryland a waiver of the limitation requires that an organization persuade a member of the Governor's Cabinet that the 25-percent limit would "effectively prevent the charitable organization from raising contributions."

There are substantial differences between the grounds for waiver in Fort Worth and Maryland, as demonstrated by the following example: Assume that an advocacy-oriented organization has for several years collected $100,000 yearly, with solicitation costs of $24,000, just within Maryland's 25-percent limitation. The organization then decides to increase the scope of its advocacy efforts, and raises $200,000, but spends $52,000 in the process—just over 25 percent. The next year it becomes more ambitious and collects $400,000, at a cost of $160,000, or 40 percent. In Fort Worth an official could easily find that this organization's stepped-up advocacy campaign and increased percentage of fund-raising expenses were entirely "reasonable." However, a Maryland official could not find that the 25-percent limit would "effectively prevent the charitable organization from raising contributions" because it had previously operated for several years with fund-raising expenses under the 25-percent limit.

The court below therefore correctly found that the statute abridged the freedom of voluntary associations to make their own policy choices in the area of fund raising, contrary to this Court's decision in *Schaumburg* that organizations which in good faith exceed percentage limitations on fund-raising costs may not validly be "lumped

with those engaging in fraud." Pet. App. 21a, citing 444 U.S. at 637. As in *Schaumburg*, the statute fails to recognize that "the costs incurred by charitable organizations conducting fund-raising campaigns can vary dramatically depending upon a wide range of variables, many of which are beyond the control of the organization." 444 U.S. at 637 n.10.[6]

Viewed in another light, Maryland's statute is contrary to prior decisions of this Court which have established that permit schemes which give local officials great discretion to interfere with the operation of voluntary associations are invalid under the First Amendment. *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620-22 (1976); *Largent* v. *Texas*, 318 U.S. 418, 422 (1943); *Schneider*

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[6] As the Maryland high court recognized, Pet. App. 21a, and despite Petitioner's claims, it is not at all clear that the *Fort Worth* decision would survive the scrutiny of this Court after *Schaumburg*. Indeed, in a case decided since *Schaumburg*, the Fifth Circuit itself impliedly rejected the reasoning of its earlier decision in *Fort Worth*. *Fernandes* v. *Limmer*, 663 F.2d 619 (5th Cir. 1981), *reh'g denied*, 669 F.2d 729 (5th Cir.), *cert. dismissed*, 103 S. Ct. 5 (1982). In *Fernandes*, a religious organization challenged a permit system of the Dallas-Fort Worth Regional Airport Board that set a 25-percent limit on solicitation costs. Higher costs were "presumed to be unreasonable," but the presumption was rebuttable "upon good cause shown." *Id.* at 638-39. In court, the Airport Board relied primarily on the close similarity of its ordinance to that in *Fort Worth*. *Id.* at 630. Nonetheless, the Fifth Circuit invalidated the Airport Board's ordinance, finding that *Schaumburg* held that "the realm of religious and charitable organizations" whose rights to solicit funds were protected by the First Amendment "includes groups whose unorthodox messages will inevitably yield less cost-effective solicitation results." *Id.* at 631.

The *Fernandes* court also found it significant that while the Fort Worth percentage limitation ordinance excluded religious organization from its ambit, the Airport's ordinance did not, and thus suffered an additional infirmity: "The First Amendment says we do not question such good faith religious commitments." *Id.* Like the provision in *Fernandes*, Maryland's law also subjects religious organizations to a percentage limitation. Petitioner's reliance on *Fort Worth* is thus misplaced.

v. *State*, 308 U.S. 147, 163-64 (1939); *see* also Rehnquist, J., dissenting in *Schaumburg*, 444 U.S. at 640, 643 & n.1.

Maryland's Secretary of State construes the statute as a delegation of discretion to determine whether an organization's fund-raising expenses are "necessary to the accomplishment of the organization's charitable purpose" and whether there is "no other reasonable alternative." COMAR 01.02.04.05B(1). This vague set of standards allows a State official to pass on the comparative efficiency of fund-raising methods and to limit fund raising to his conception of what fits the organization's "charitable purpose." This law could thus be employed to control the scope of an organization's fund-raising efforts, the way it delivers its message, the nature of the message itself and, most importantly, to restrict the organization's very purpose. The authority to waive the arbitrary 25-percent limit thus creates the possibility of "censorship through license which makes impossible the free and unhampered distribution" of ideas. Such restriction "strikes at the very heart of the constitutional guarantees" of the First Amendment. *Schneider* v. *State*, 308 U.S. at 164.

As if to demonstrate the vagueness of the discretion conferred by the statute, Petitioner claims that its power extends beyond that of controlling fraud, which was the subject of *Fort Worth* and *Schaumburg*. Proclaiming the purpose to "protect charities themselves from unscrupulous professional fund-raisers," in order to protect "public confidence" in the organizations, Pet. Br. 37-39, Petitioner would exercise virtually unlimited regulatory powers in determining whether to grant a waiver. Petitioner asserts that the statute is not limited in purpose to preventing fraud, but is "flexible," and authorizes what amounts to management control over fund-raising efforts. Petitioner grounds its position on the premise that the State must be considered to represent the public,

which is a "third party" in contracts between "charitable organizations and charitable fund-raisers." Pet. Br. 37.

Petitioner continues its efforts to justify pervasive controls by asserting that the trustees and directors of organizations are "not subject to the traditional profit and loss constraints of the market place or the scrutiny of shareholders and investors. . . . Most importantly, the direct and ultimate beneficiaries of charities—the poor, the disadvantaged, the handicapped and the general public—often are incapable of protecting their own interests." Pet. Br. 38. But *Schaumburg* has held that percentage limitations *per se* are crude, ineffective controls over fraud; they are no better means of controlling overreaching by fund raisers or ineptness on the part of the organizations. Petitioner therefore relies upon the "flexible" waiver power as a mechanism for control over the wisdom of the managers of voluntary organizations.

The opportunities for discrimination against organizations that have the burden of establishing the negative proposition that there is no other way of effectively raising funds are obvious. Hostility resulting in discrimination could readily arise either from narrow partisan concerns or deep policy clashes.

Even the most traditional charities could thus find their solicitation efforts hostage to the goodwill of a State officer and be required to support a particular State administration to secure relief from the percentage limitation. The claim of power to administer such broad discretion is particularly threatening, however, to the First Amendment rights of public interest and advocacy organizations, which often have heavy "solicitation" costs because they combine education, political activity and advocacy with fund raising. *Schaumburg*, 444 U.S. at 635-36.[7]

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[7] The burden this statute places upon advocacy groups is exacerbated substantially by Petitioner's regulation, COMAR

Apparently sensing the dangers in a statute authorizing such power, Petitioner asserts that "the Maryland law is being administered in a careful fashion with attention being paid to the First Amendment rights of advocacy groups." Pet. Br. 10. In addition, Petitioner argues that the State's Attorney General has advised that "the Secretary of State should not hesitate to grant waivers that are based on a responsible showing of justification, especially as regards the public interest type organization described in the *Schaumburg* opinion." 65 Op. Att'y Gen. 58, 65 (Md. 1980); *see* Pet. Br. 10.

There is no demonstration that Petitioner has exercised the suggested respect for the rights of advocacy groups.[8] Petitioner's argument, however, exposes the basic infirmity of a grant of broad discretionary power: the asserted generous respect for the rights of advocacy groups could just as well be exercised in the opposite direction.

The *amici* brief filed by nine States, three of whose statutes permit waivers of percentage limitations on various grounds,[9] demonstrate how such waiver power

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01.02.04.04A(3), which provides that the full cost of educational communications and activities must be counted as a fund-raising expense if any portion, however small, includes a request for contributions—even a request that is "implied."

[8] The evidence of such care is merely a tabulation revealing that only a few exemption requests were received in the last couple of years, and all but three were granted. Pet. Br. A.6.

[9] Those three states are Massachusetts, which allows an organization to agree to pay to a professional fund-raiser no more than 15 percent of contributions, Mass. Ann. Laws ch. 68, § 21, and limits a charity's total solicitation costs to 50 percent of gross proceeds, but allows a waiver of the latter provision if "it would be in the public interest to allow [the solicitation] from the public," *id.*, § 22; Pennsylvania, which limits a professional fund-raiser's compensation to 15 percent of gross proceeds, and total solicitation costs to 35 percent of gross proceeds, allowing a waiver of only the latter limit for a showing of "special facts or circumstances," Pa. Stat.

can provide the basis for broad discretionary regulation. *Amici* assert, first of all, that the percentage limitation provisions are not "primarily" for the purpose of controlling fraud at all. Amici Br. 25 n.12. Rather, they are intended to provide broad *parens patriae* control over the covered organizations. Amici Br. 19, 23-25.

In complete disregard of the fact that percentage limitation laws have a direct and heavy impact on public interest advocacy groups whose activities are often in direct conflict with State administrations, the *amici* hark back to the Statute of Charitable Uses of 1601 and claim power to act as a super board of directors for such organizations:

> ". . . Under for-profit corporation law, certain actions must be brought to the shareholders for vote or review . . . . A charity, instead of being accountable to private shareholders, is accountable to the indefinite public. The state has traditionally represented that public . . . A flexible state percentage falls within this tradition by providing for an independent state review when a charity decides because of special circumstances to spend more than a certain amount of the public's money on its own dreams of expansion." Amici Br. 32-33; to the same general effect *see id.* at 3, 5, 31-32, and 35-36.

It is obvious that the State's interest in protecting against charitable fraud and over-reaching does not comprehend such absolute control over all forms of voluntary associations, and it is clear that such control would constitute massive infringement of First Amendment rights. The fact that waiver provisions could be employed for that purpose should certainly condemn them.

Ann. tit. 10, § 160-6; and Tennessee, whose law states that a charity's solicitation costs in excess of 25 percent of gross proceeds "create a rebuttable presumption that [they are] unreasonable, unless approved by the Secretary of State" on unspecified grounds. Tenn. Code Ann. § 48-2213(b).

II. The Statute Does Not Serve a Compelling State Interest and Is More Intrusive upon Freedom of Speech Than Other Less Restrictive Measures

Even if the waiver authority did not itself offend First Amendment principles, it would not remedy the basic constitutional infirmity of the Maryland statute. *Schaumburg* establishes that charitable solicitations are entitled to First Amendment protection, and that controls over such solicitation must meet the well-settled test that they be (1) designed to serve a compelling governmental interest, and (2) no more intrusive on First Amendment rights than is necessary to achieve that compelling purpose. Maryland's statute fails both aspects of this test.

First, *Schaumburg* assumed that the ordinance there was intended to serve the compelling state interests of protecting against fraud and protecting the public streets. In the present case, the State claims the right to protect "another interest not even asserted in *Schaumburg*," Pet. Br. 37—to protect charitable organizations from "unscrupulous" fund raisers. As this term unfolds, and as it is elaborated upon in the brief of the *amici* States, it reveals a claimed governmental purpose to protect the supporters of covered organizations from weak or inattentive management. This purpose is not a "compelling state interest" warranting any intrusion on First Amendment rights.

Arguments derived from asserted common law authority to oversee "traditional charities"—institutions to help the poor, sick and aged—are irrelevant to the Maryland statute, which covers public interest, educational, religious, and advocacy groups of all kinds. There is no historical support or precedent for the notion that these latter organizations are subject to state oversight with respect to their financial decisions. Moreover, the freedoms of speech, assembly and religion are incompatible with any governmental power to review the financial wisdom

with which such organizations are managed, because financial decisions are inextricably related to policies and objectives. Accordingly, the First Amendment forbids government efforts to "protect voluntary" associations from "unscrupulous" fund raisers by exercising direct control over the organizations' expenditures.

This case does not present the question of a State's power to regulate professional fund raisers as such; the statute restrains charitable organizations from incurring fund-raising expenses that exceed the stated limit, whether or not the expenses reflect the charges of fund raisers. While there are other provisions in the statute designed to regulate fund raisers by means of license fees, registration and bonding, they are not at issue here. The question is whether Maryland has a legitimate interest in preventing a Fraternal Order of Police chapter from spending more money on fund-raising activities than Petitioner deems wise. If Maryland has the power to take such action, it has a basis for claiming analogous power to control salaries, consulting fees, research contracts, litigation expenses, public relations expenses, and lobbying fees of organizations such as the ACLU, the American Enterprise Institute, the National Rifle Association, the Council of Churches and the NAACP by direct controls over the expenditure of funds.

Clearly the government lacks power to manage the voluntary associations covered by Maryland's statute on any theory that they need to be protected from their own officers, employees, consultants, lawyers, accountants, publishers and broadcasters, all of whom, just like fundraisers, might be "unscrupulous" in demanding and receiving high fees for their services. If, as the *amici* States assert, these statutes are not "primarily" about fraud, then at least as to public interest advocacy groups, they serve no compelling state interest warranting any intrusion on First Amendment rights.

Second, a percentage limitation on expenses, even with exceptions for "necessary" or "reasonable" expenses in

excess of the percentage, is an invalid indicator of either fraud or mismanagement. Fund-raising expenses of 24.5 percent could be the product of fraud or poor management, and an organization with expenses of 25.5 percent could be perfectly honest and efficient. It is therefore arbitrary to impose special burdens on charitable organizations to justify expenses of 25 percent or more, and no State interest is served by the drawing of such a line.

As the Court said in *Schaumburg*, "The costs incurred by charitable organizations conducting fundraising campaigns can vary dramatically depending upon a wide range of variables, many of which are beyond the control of the organization." 444 U.S. at 637 n.10. For that reason, as the Court observed, protection against fraud is only "peripherally promoted" by percentage limitations. *Id.* at 636. "Peripheral" may be too kindly a term, if one may judge from a small sample offered by Petitioner's Exhibit A, Pet. Br. A.6, which discloses that Petitioner granted 13 exemptions over the period, of which the lowest contemplated expenses of 48 percent, five were between 70 percent and 77 percent, and five were between 80 percent and 85 percent.

Actually, there are no comprehensive studies or other data which support any percentage limitation. A 1975 study of 4260 charitable organizations that filed expense records in New York and Illinois shows that a 25-percent limit would affect a surprisingly large number, accounting for a substantial percentage of all charitable collections reported.[10] However, there are no studies that disclose the incidence or the amount of fraud associated with charitable solicitations.[11]

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[10] For example, charities accounting for 13.8 percent of contributions reported in Illinois and 9.6 percent of contributions in New York had solicitation costs greater than 25 percent. Gross, *Fund Raising and Program Cost Ratios*, 8 Philanthropy Monthly 28, 30 (June 1975).

[11] Petitioner's sole authority is an estimate in a law review note published in 1967. Pet. Br. 37, n.25, citing Note, *Charitable Solici-*

The absence of data and the confusion of purpose result in a variety of State percentage limitations, computed on a bewildering array of bases, which are in themselves testimony to the crudeness of such limits. Nationally the statutory limits on the books include 5 percent to professional fund raisers (North Carolina *);[12] 10 percent to professional fund raisers (Oklahoma); 15 percent to professional fund raisers (Kentucky *, New Jersey *, West Virginia *); 20 percent to profesisonal fund raisers (Hawaii); 25 percent to professional fund raisers (Arkansas, Florida, Tennessee); 30 percent to professional fund raisers (Minnesota *, South Dakota); 15 percent to professional fund raisers, 35 percent total solicitation costs (North Dakota *, Pennsylvania **);[13] 15 percent to professional fund raisers, 50 percent total solicitation costs (Massachusetts ***); 25 percent to professional fund raisers, 50 percent total solicitation costs (Rhode Island *); 20 percent total solicitation costs (Washington *); 25 percent total solicitation costs (Maryland ****); a variable percentage (25 to 50) to professional fund

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tation Acts—An Attempt to Curb Charity Cheats, 16 De Paul L. Rev. 472 (1967).

[12] Citations for the statutes described in this paragraph are found in the appendix to this brief at page 16a.

[13] Following *Schaumburg*, the North Dakota Supreme Court found that State's percentage limitation, N.D. Cent. Code § 50-22-04.1, to be an invalid infringement of the First Amendment rights of voluntary organizations in *State* v. *W.R.G. Enterprises*, 314 N.W.2d 842 (N.D. 1982).

* . . . . This State's law contains an adjustment for the actual costs of goods or services provided to the public in the calculation or calculations described.

** . . . . This State's law contains an adjustment for the cost of goods and services provided to the public in the calculation of total solicitation costs only.

*** . . . . This State's law contains an adjustment for the cost of goods and services provided to the public in the calculation of the percentage paid to professional fund raisers only.

**** . . . . This State's law excludes the costs of goods and services provided, feasibility studies, postage, and printing from the percentage calculation.

raisers, depending on the amount collected and the amount spent on goods or services provided to the public (Connecticut); and a "reasonable" percentage to professional fund raisers (South Carolina *).

In fundamental disregard of the principle of *Schaumburg*, no State attempts to adjust its percentage limitation to the distinctions between the methods of operations employed by traditional charities and by public interest advocacy groups; the same flat percentage formulae apply to all covered organizations. Indeed, Petitioner's regulations expressly consider an educational expense or activity to be entirely for fund raising if it includes even an "implied" appeal for financial support. COMAR 01.02.04.04A(3).

A basic defect of percentage limitations is that they disregard the lessons of the market place. Assuming that the organization is not engaged in self-dealing, it must secure fund-raising aid in the open market, and it pays the prices charged by the sellers of the goods and services it needs to conduct its campaign. This Court's decisions with respect to the Sherman Antitrust Law long ago recognized that there is no administrative way to determine whether prices are "reasonable." The task is impossible because conditions change from day to day, *United States* v. *Trenton Potteries*, 273 U.S. 392, 398 (1927), and because of the "dynamic quality of the business facts underlying price structure," *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). These are the unremitting facts which confront any effort to second-guess the managements of the institutions in this huge industry, and no percentage limitation, even aided by a supplemental review as to "reasonableness" or "necessity," can be anything but arbitrary.

Petitioner seeks to avoid this point by suggesting that the percentage limitation is useful because the market is somehow inoperative where voluntary associations are concerned. Without reference to any studies or any verifiable evidence, Petitioner asserts that charitable or-

ganizations enter into "no-risk percentage fund-raising . . . without making a reasonable financial decision"; that "the conduct of trustees and directors of charitable organizations is not subject to the traditional profit and loss constraints of the market place or the scrutiny of shareholders and investors"; and that "the direct and ultimate beneficiaries of charities—the poor, the disadvantaged, the handicapped and the general public—often are incapable of protecting their own interests." Pet. Br. 38.[14]

Discussing a related point, the *amici* States ominously assert that decisions which might result in increased fund-raising costs are not choices "which should be entirely left to the charity," including the decision to espouse "an extremely unpopular cause," or to "expand one's donor base." [15] Amici Br. 31. The brief goes on to characterize such decisions as improper "dreams of expansion" which assertedly may be regulated by percentage limitations on fund-raising expenses. *Id.* at 33. However, such decisions —what to espouse and how to expand public support—lie at the very core of our First Amendment guarantees, and their regulation cannot be said to be "strong, subordinating interest[s] that [a State] is entitled to protect." *Schaumburg*, 444 U.S. at 636.

Even if these legislative aims can be molded to represent permissible State interests, mere assertion is a poor basis for imposing government control over the fund-raising efforts of the organizations involved, and the truth of the States' assertions is highly questionable. Voluntary

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[14] The *amici* States argue that the public must be protected from charities that enter into percentage fund-raising contracts in order to get "something for nothing," Amici Br. 51-52, and that a charity may forfeit its "good name and charitable appeal . . . without making a reasoned financial decision." *Id.* at 56-57.

[15] Because for an advocacy-oriented organization, an appeal for funds will often "necessarily combine" the "advocacy of public issues," *Schaumburg*, 444 U.S. at 635 (citation omitted), the decision to "expand one's donor base" is inextricably intertwined with an organization's choice of its audience and basic program.

organizations do have to compete year after year for contributions and, as people become less affluent and government less forthcoming, the competition is surely much stiffer. Outside the government there are many protectors of the charities and their beneficiaries: newspapers, magazines, books, radio and television stations, civic leaders and watchdog groups; and the boards of directors of the charities, who have successful business, professional, educational, and religious backgrounds, are no less competent than State officers.

In considering the asserted aims of the State, it is highly relevant that politicians and their appointees will not necessarily bring honesty and good financial judgment to the operations of charitable organizations. According to contemporaneous newspaper articles, the Maryland law was inspired in large part by disclosures in the press that the State's Governor and some of his political allies had received financial favors from a Pallotine Fathers mission that allegedly focussed more on investment activities than on missionary work.[16] It is ironic that the law should thereupon give a member of the Governor's cabinet the task of overseeing the finances of voluntary organizations.

Maryland's law is not only a poor means of serving a compelling State interest; it also fails the second portion of the standard test applied to restraints on First Amendment rights: that the restraint be the least intrusive measure capable of serving the government's compelling interest. In *Schaumburg* the Court pointed out that direct controls over fraud and misrepresentation, and public disclosure laws were good remedies for the evils described, and need involve no impermissible intrusion on solicitation rights. 444 U.S. at 637-38. These considerations apply with full force to the present case.

Maryland has statutory provisions dealing with misrepresentations concerning charitable solicitations; it has

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[16] *Washington Post*, Feb. 18, 1976, at B1; *id.*, Jan. 22, 1976, at A1.

laws dealing with professional fund-raisers; and most significantly it has a comprehensive financial disclosure law that was enacted simultaneously with the percentage limitation. The law requires complete filings with respect to the financial operations of charitable organizations, including the costs of fund raising. § 103B(a)(6). The filings are public records, § 103G, and are therefore available to the press and to watchdog organizations, as well as to interested potential donors. Charitable organizations are required to keep accurate financial records in a form that will make pertinent information available to the Petitioner. §§ 103B(a), 103H. Petitioner's annual report contains information about the financial aspects of the operations of charitable organizations. COMAR 01.02.04.03C.

Petitioner does not provide any basis for concluding that laws which directly prohibit fraud and require financial disclosure to the public do not give ample protection. Instead, Petitioner makes a curious argument that the 25-percent limitation with its "flexible" waiver authority is "far less burdensome than a comprehensive disclosure requirement would be." Pet. Br. 33. Petitioner objects that to assist in preventing fraud "effectively . . . a disclosure statute would clearly have to be both very comprehensive and readily available to the public," and could therefore constitute "significant encroachments of First Amendment rights," *id.* at 33-34. Indeed, there may be First Amendment problems with some kinds of disclosure as applied to some organizations. *E.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976). But surely the fact that a particular disclosure provision might infringe on First Amendment rights does not negate the fact that disclosure laws are "the least restrictive means" of controlling fraud, and therefore constitutionally preferable to direct controls on expenses. *See id.* at 68.[17]

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[17] The disclosure provision of Maine's Charitable Solicitations Act, Me. Rev. Stat. Ann. tit. 9, § 5012, is an example of the use of a mandatory disclosure law to protect the public from fraud and to

CONCLUSION

Maryland's statute impermissibly restrains First Amendment freedoms by granting broad discretion to a government officer to control the purse strings of public interest advocacy organizations whose programs often collide with State administrations. A State interest alleged to support it, the maintenance of efficiency among charitable organizations is neither a compelling government interest nor one that can be performed by a State officer without gross interference with First Amendment rights. The interest of the State to protect against fraud, while important, is minimally promoted by a percentage limitation, and can be better promoted by direct controls over fraud and by disclosure laws.

The judgment of the Maryland Court of Appeals should be affirmed.

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enhance donor input to the operations of voluntary organizations. The statute, which is unaccompanied by any percentage limitation on fund-raising costs, requires any person soliciting contributions to disclose to the prospective donor the percentages of contributions to be used for "program services," for "management," and for "fund raising," whenever the percentage to be used for program services is below 70 percent. "Program services" are defined as "activities directly related to the stated charitable purposes," and expressly exclude expenses related to "fund raising or management." *Id.* § 5003(10-A). In addition, Maine's disclosure law requires that professional fund raisers must in all cases disclose to potential donors all fund-raising expenses being incurred by the organization pursuant to their employment. Other sections of Maine's Charitable Solicitations Act require disclosure of the same information to the Secretary of State.

Respectfully submitted,

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APPENDIX

APPENDIX

Article 41 of the Annotated Code of Maryland provides, in pertinent part:

§ 103A. Definitions.

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(b) *"Charitable organization"* means an organization which is or holds itself out to be a benevolent, educational, philanthropic, humane, patriotic, religious, or eleemosynary organization and solicits or obtains contributions solicited from the public for charitable purposes. It includes a chapter, branch, area, office, or similar affiliate soliciting contributions within the State of Maryland for a charitable organization which has its principal place of business outside the State. It does not include a political party, political committee, political club, or an agency of the State government, or of a political subdivision.

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§ 103B. Registration of charitable organizations; required reports.

(a) Every charitable organization located in this State which intends to solicit contributions within or without this State, or every charitable organization which intends to solicit contributions within this State or to have funds solicited on its behalf shall, at least 30 days prior to making any solicitation or authorizing or allowing a solicitation to be made on its behalf, file a registration statement with the Secretary of State upon forms prescribed by him. Thereafter, if the charitable organization intends to engage, or does engage, in solicitation, a registration form shall be filed within three months of the close of each fiscal year in which it so intends or does engage in solicitation. The president, chair-

man, or other principal officer of the charitable organization is personally responsible for timely filing the registration statement. The statement shall be accompanied by a signed affidavit and shall contain the following information with respect to the organization:

(1) Its name and the purpose for which it was organized;

(2) Its principal address and either the address of its officers in this State or, if it does not maintain an office in this State, the name and address of the person having custody of its financial records;

(3) The names and addresses of any chapters, branches, or affiliates in this State;

(4) The place where and the date when it was legally established, the form of its organization, and a reference to any determination of its tax-exempt status or change in its tax-exempt status under the Internal Revenue Code. A copy of the determination shall be filed with the statement;

(5) The names and addresses of its officers, directors, trustees, and principal salaried executive staff officers;

(6) Its balance sheet, income and expense statement, and a financial report (including the kind and amount of its gross income raised, costs and expenses incidental to the fund-raising activities, and the allocation and disbursement of gross income raised) prepared in accordance with generally accepted accounting principles for its most recently completed fiscal year.

In the event that:

(i) The total amount of gross income received equals or exceeds $100,000 an audit is required by an independent certified public accountant accord-

ing to the standards of accounting and fiscal reporting for voluntary health and welfare organizations;

(ii) The total amount of gross income received is less than $100,000 the Secretary of State at his discretion may require an audit as required in subparagraph (i).

(iii) An audit required by subparagraph (i) or (ii) above may exclude funds received from a governmental agency if audit of such funds is otherwise provided by the governmental agency.

(7) Whether it intends to solicit contributions from the public directly or have the solicitations made on its behalf by others;

(8) Whether it is authorized by any other governmental authority to solicit contributions;

(9) Whether it is or has ever been subject to an order of any court or administrative agency restraining or restricting its fund-raising activities, and, if so, such information pertaining thereto as the Secretary of State may require;

(10) The purpose or purposes for which the contributions to be solicited will be used;

(11) The name or names under which it intends to solicit contributions if different from that given pursuant to paragraph (a)(1) of this section;

(12) The names and residence addresses of the depository and of the persons who will have final responsibility for the custody of the contributions;

(13) The names and residence addresses of the persons responsible for the final distribution of the contributions.

(b) Each chapter, branch, or affiliate of a charitable organization, other than an independent mem-

ber agency of a federated fund-raising organization, shall either file a separate registration statement or report the information to its parent organization which shall then file a consolidated statement for its Maryland affiliates, chapters, and branches. An independent charitable organization member agency or a federated fund-raising organization shall file a separate registration statement, unless specifically exempted from doing so or unless the member agency does not engage in solicitation other than as a member of a federated fund-raising organization. A federated fund-raising organization shall file a separate registration statement as a charitable organization.

(c) Every organization under this subtitle which files a separate registration statement shall pay a fee of $25.

(d) Every charitable organization which intends to discontinue solicitation shall file a statement of its intention to terminate solicitation and a final financial statement, identical in content to the registration statement, within three months of the close of its fiscal year.

§ 103C. Exemptions from registration.

(a) The following charitable organizations are not required to file a registration statement if they do not employ a professional solicitor to solicit funds on their behalf or if they do not mail more than 500,000 solicitations for charitable contributions in any one year:

(1) An educational institution approved by the State Department of Education, either directly or by acceptance of its accreditation by an accrediting body recognized by that Department. However, the educational institution shall file with the Secretary of State a copy of the annual fiscal reports that it files with the State Department of Education.

(2) Persons requesting contributions for the relief of individuals specified by name at the time the solication is made if the gross amount of the contribution collected, without any deductions, are turned over to the named beneficiaries for their use.

(3) A charitable organization which does not intend to solicit and does not actually receive contributions from the public in excess of $5,000 during the year for which a registration statement would otherwise be required, if (i) all of its fund-raising activities are carried on by persons who are unpaid for their services, and (ii) no part of its assets or income inures to the benefit of or is paid to any officer or member of the organization.

(4) A nonprofit and charitable hospital or related institution which is required by law to file financial reports at least annually with the Department of Health and Mental Hygiene or an agency of it. However, the hospital shall file with the Secretary of State a copy of the annual fiscal report most recently filed with the Department of Health and Mental Hygiene.

(5) An organization which solicits only from among its members. A person who is granted a membership upon making a contribution as the result of solicitation is not a member for purposes of this exemption.

(6) A bona fide religious organization, its parent, or a school affiliated with it, if the religious organization, its parent, or the affiliated school has received a declaration of current tax-exempt status from the government of the United States.

(7) A local post, camp, chapter, department, or similarly designated element, or a county unit of such elements of a bona fide veterans' organization or a bona fide community service organization which

issues charters to local elements throughout the State; a bona fide community, civic, or improvement association; a bona fide fraternal or sororal organization; a bona fide organization of volunteer firemen; a bona fide volunteer ambulance association or bona fide volunteer rescue squad association; or a bona fide auxiliary or affiliate of any such organization, if all of its fund-raising activities are carried on by the members of the organizations or an affiliate of it, and the members receive no compensation for performing these activities.

(8) A parents and teachers association affiliated with any school covered in paragraph (1), or affiliated with a local board of education.

(9) A society for the prevention of cruelty to animals.

(b) A charitable organization claiming to be exempt from the registration provisions of this subtitle and which is about to or does solicit charitable contributions shall initially submit to the Secretary of State on forms prescribed by him, the name, address, and purpose of the organization and a statement setting forth the reason for the claim for exemption. However, if a charitable organization has local elements in this State the charitable organization may submit, on behalf of its local elements, the name, address and purpose of the organization and its local elements and a statement setting forth the reason for the claim for the exemption. If exempted, the Secretary of State shall initially issue a letter of exemption which may be exhibited to the public. A registration fee is not required of an exempt organization.

(c) Thereafter, a charitable organization shall certify to the Secretary of State, upon the initiative of the Secretary, a brief certification which shall

state that the status of the charitable organization is unchanged.

(d) A charitable organization claiming to be exempt from the registration provisions of this subtitle, shall report to the Secretary of State any change from its exempt status by registered mail within 10 days of the occurrence. Within 30 days after the change in status the organization shall file the registration statement in accordance with § 103B.

§ 103D. Limitations on amount of payments for solicitation activities.

(a) A charitable organization other than a charitable salvage organization may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity. The Secretary of State shall, by rule or regulation in accordance with the "standard of accounting and fiscal reporting for voluntary health and welfare organizations" provide for the reporting of actual cost, and of allocation of expenses, of a charitable organization into those which are in connection with a fund-raising activity and those which are not. The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

The 25% limitation in this subsection shall not apply to compensation or expenses paid by a charitable organization to a professional fund-raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund-raising activity, such

compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund-raising activity.

(b) For purposes of this section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drink sold or provided to the public, nor should these costs be included as fund-raising costs; (2) the actual postage paid to the United States Postal Service and printing expenses in connection with the soliciting of contributions, nor should these costs be included as fund-raising costs.

(c) Every contract or agreement between a professional fund-raiser counsel or a professional solicitor and a charitable organization shall be in writing, and a copy of it shall be filed with the Secretary of State within ten days after it is entered into and prior to any solicitations.

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§ 103F. Registration of professional fund-raiser counsel and professional solicitor; bonds.

(a) A person may not act as a professional fund-raiser counsel or professional solicitor for a charitable organization unless he has first registered with the Secretary of State. Applications for registration shall be in the form prescribed by the Secretary of State, shall contain the information required by him, and shall be under oath. The application for registration by a professional fund-raiser counsel or a professional solicitor or renewal of it shall be accompanied by an annual fee of $100. A partnership, corporation or other entity which intends to act as a professional fund-raiser counsel or professional solicitor, may register for and pay a single fee of $100 on behalf of all its members, officers, agents, and

employees. However, the names and addresses of all officers, agents, and employees, of the professional fund-raiser counsel or professional solicitor, and all other persons employed to work under its direction must be listed in the application.

(b) Every professional fund-raiser and professional solicitor shall, at the time of making application, file with and have approved by the Secretary of State a bond in which the applicant shall be the principal obligor in the sum of ten thousand dollars ($10,000) with one or more sureties satisfactory to the Secretary of State, whose liability in the aggregate as such sureties will at least equal the sum and maintain the bond in effect so long as a registration is in effect. The bond shall run to the State of Maryland for the use of the State and any person who may have a cause of action against the obligor of the bonds for any losses resulting from malfeasance, nonfeasance or misfeasance in the conduct of solicitation actiivties. A partnership or corporation which is a professional fund-raiser may file a consolidated bond on behalf of all its members, officers and employees.

(c) Each registration is valid for one year and may be renewed for additional one-year periods upon application to the Secretary of State, payment of the renewal fee, and proof that the required bond, cash, or cash equivalent is and will remain in effect.

(d) If the Secretary of State finds that the application is in conformity with the requirements of this section and the rules and regulations adopted pursuant to it, and that the registrant has complied with the requirements of this subtitle and the rules and regulations adopted pursuant to it, he shall approve the registration. An applicant whose application for registration is denied, may within 30 days from the date of notification of the denial, request in writing

a hearing before the Secretary of State. A hearing shall be held within 60 days from the date the Secretary of State receives the request.

§ 103G. Information filed to become public records.

All registration statements, reports, professional fund-raiser counsel contracts, professional solicitor contracts, and other documents and information required to be filed under this subtitle with the Secretary of State are public records. They shall be maintained in the office of the Secretary of State for at least two years, and shall be available to the general public for inspection and photocopying, at reasonable prices, during the normal business hours of the Secretary of State.

§ 103H. Records to be kept by charitable organizations.

Every charitable organization shall in accordance with the rules and regulations prescribed by the Secretary of State, keep true and accurate fiscal records as to its activities in Maryland in such form as will enable it accurately to provide the information required by this subtitle. Upon demand, these records shall be made available to the Secretary of State for inspection. The records shall be retained for a period of at least three years after the end of the period of registration to which they relate.

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§ 103J. Prohibited acts.

(a) A charitable organization, professional fund-raiser counsel, and professional solicitor may not use or exploit the fact of registration so as to lead the public to believe that the registration in any manner constitutes an endorsement or approval by the State of Maryland. However, the use of the following statement shall not be deemed a prohibited exploita-

tion: "Registered with the Secretary of State of Maryland as required by law. Registration does not constitute or imply endorsement of a public solicitation for contributions."

(b) A person may not, in connection with the solicitation of contributions for or the sale of goods or services of a person other than a charitable organization, misrepresent to or mislead anyone by any manner, means, practice, or device, to believe that the person on whose behalf the solicitations or sale is being conducted is a charitable organization or that the proceeds of the solicitation or sale will be used for charitable purposes, if that is not the fact.

(c) A person may not in connection with the solicitation of contributions or the sale of goods for charitable purposes represent to or lead anyone by any manner, means, practice, or device to believe that any other person sponsors or endorses the solicitation of contributions, or sale of goods or services for charitable purposes, or approves of the charitable purposes or the charitable organization if the other person has not given consent to the use of his or her name for these purposes. Any member of the board of directors or trustees of a charitable organization and any other person who has agreed either to serve or to participate in any voluntary capacity in the campaign shall be deemed thereby to have given his consent to the use of his or her name in the campaign.

(d) A person may not make any representation that he is soliciting contributions for or on behalf of a charitable organization or use or display any emblem, device, or printed matter belonging to or associated with a charitable organization for the purpose of soliciting or inducing contributions from the public without first being authorized to do so by the charitable organization.

(e) A professional solicitor may not solicit in the name of or on behalf of any charitable organization unless the solicitor has:

(1) Written authorization of two officers of the charitable organization, a copy of which is filed with the Secretary of State. The written authorization shall bear the signature of the professional solicitor and shall expressly state on its face the period for which it is valid; and

(2) A copy of the authorization with him when he makes solicitations and exhibits it and personal identification on request to persons solicited.

• • • •

§ 103L. Enforcement of subtitle; penalties.

(a) A charitable organization, professional fund-raiser counsel, or professional solicitor which wilfully fails to file a registration statement, report, or other information with the Secretary of State or wilfully files such a statement, report, or other information which is materially false, or otherwise wilfully violates the requirements of this subtitle, is guilty of a misdemeanor, and, upon conviction, shall be fined not more than $5,000 or sentenced to imprisonment for not more than one year, or be both fined and imprisoned. An officer, director, partner, or trustee of a charitable organization, professional fund-raiser counsel, or professional solicitor which is organized in corporate, partnership, or other organizational form who causes the entity to commit a wilful violation of this subtitle is also guilty of a misdemeanor, and, upon conviction, is subject to the same penalties as the entity.

(b) The Secretary of State is authorized, upon complaint or upon his own motion, to investigate alleged violations of this subtitle. If he finds that a charitable organization, professional fund-raiser

counsel, or professional solicitor has violated a provision of this subtitle, he may:

(1) Cancel and annul the registration of the violator;

(2) Refer the matter to the Attorney General for civil enforcement under subsection (c); and

(3) Refer the matter to the appropriate State's attorney for prosecution.

(c) Upon referral by the Secretary of State, the Attorney General may file a civil action in the Circuit Court for Anne Arundel County for an order restraining further violations of this subtitle, restraining the defendant from conducting any further fund-raising activities in Maryland, enforcing compliance with this subtitle, and such other relief as he deems appropriate. As a condition of registration, each charitable organization, professional fundraiser counsel, and professional solicitor shall consent in writing to the jurisdiction and venue of the Circuit Court for Anne Arundel County to grant appropriate relief.

(d) The Secretary of State shall adopt rules and regulations for the administration and enforcement of this subtitle.

The Code of Maryland Regulations provides, in pertinent part:

01.02.04.01 Definitions.

• • • •

G. "Charitable purpose" means any charitable, benevolent, philanthropic, patriotic, or eleemosynary purpose for religion, health, education, social welfare, arts and humanities, and civic and public interests.

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01.02.04.02 Responsibilities of Persons Regulated.

A. Exemption Organizations.

(1) An organization which is exempt from the registration requirement remains subject to all of the other regulatory provisions of the Act and these regulations.

• • • •

01.02.04.03 Responsibilities of the Secretary.

• • • •

C. Annual Report by the Secretary.

(1) The Secretary shall compile and print each July a report listing the professional solicitors, the professional fund-raiser counsel, and the organizations registered, and the organizations exempted from the registration requirement. . . .

• • • •

01.02.04.04 Allocation of Expenses.

A. Program Services Expenses. . . .

• • • •

(3) The expenses of public education materials and activities, which include an appeal, specific or implied, for financial support, shall be fully allocated to fund-raising expenses.

• • • •

01.02.04.05 Twenty-five Percent Limitation.

• • • •

B. Exceeding the 25-percent Limitation.

(1) The Secretary may permit an organization to exceed the 25-percent limitation contained in Article 41, § 103D(a), Annotated Code of Maryland, upon a showing that it is necessary to the accomplishment of the organization's charitable purpose and that there is no other reasonable alternative.

(2) Instances in which the 25-percent limitation would effectively prevent an organization from raising contributions, include, but are not limited to, the following situations:

(a) When there are extraordinary, unusual, and non-recurring circumstances which can be factually supported; and

(b) When an organization is less than 2 fiscal years old and in the developmental stage.

• • • •

CITATIONS TO STATE LAWS WITH PERCENTAGE LIMITATIONS ON FUND-RAISING COSTS

Arkansas. . Ark. Stat. Ann. § 64-1610

Connecticut. . Conn. Gen. Stat. § 19-323o

Florida. . Fla. Stat. ch. 496.11(8)

Hawaii. . Hawaii Rev. Stat. § 467B-7

Kentucky. . Ky. Rev. Stat. § 367.655

Maryland. . Md. Ann. Code art. 41, § 103D

Massachusetts. . Mass. Ann. Laws ch. 68, §§ 21, 22

Minnesota. . Minn. Stat. Ann. § 309.555

New Jersey. . N.J. Stat. Ann. § 45:17A-10

North Carolina. . N.C. Gen. Stat. § 108-75.11

North Dakota. . N.D. Cent. Code § 50-22-04.1

Oklahoma. . Okla. Stat. Ann. tit. 18, § 552.3B

Pennsylvania. . Pa. Stat. Ann. tit. 10, § 160-6

Rhode Island. . R.I. Gen. Laws § 5-53-4

South Carolina. . S.C. Code Ann. § 33-55-80

South Dakota. . S.D. Comp. Laws Ann. § 37-27-24

Tennessee. . Tenn. Code Ann. § 48-2213(b)

Washington. . Wash. Rev. Code Ann. § 19.09.100(1)

West Virginia. . W. Va. Code § 29-19-7

Office - Supreme Court, U.S.
FILED
MAR 24 1983
ALEXANDER L. STEVAS,
CLERK

82-766
NO. 82-914

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SECRETARY OF STATE OF MARYLAND
Petitioner,

v.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF FOR THE STATES OF CONNECTICUT, ILLINOIS, KANSAS, MASSACHUSETTS, NEW JERSEY, NEW YORK, PENNSYLVANIA, SOUTH DAKOTA, and TENNESEE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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NO. 82-914

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Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

INTEREST OF THE AMICI CURIAE

This brief is submitted pursuant to Rule 42 by Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts on behalf of Massachusetts and joined by the following other states:

Connecticut	Attorney General Joseph I. Lieberman
Illinois	Attorney General Neil F. Hartigan
Kansas	Attorney General Robert T. Stephan
New Jersey	Attorney General Irwin I. Kimmelman

New York	Attorney General Robert Abrams
Pennsylvania	Attorney General LeRoy S. Zimmerman
South Dakota	Attorney General Mark Meierhenry
Tennessee	Attorney General William M. Leech, Jr.

Each of these states has either common law or statutory regulatory jurisdiction over charitable funds and organizations.

This case marks the first time that this Court has reviewed a state charitable solicitation statute which regulates fundraising costs. While a number of cases have dealt with municipal ordinances governing various forms of in-person solicitation,[1/] the

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1/ Most recently in Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

constitutional limits on state regulatory schemes aimed at the administration of charitable fundshave never been delineated by this Court. This distinction is important because the states have a long standing and traditional role vis a vis charitable organizations. The amici will argue that their purposes in regulating charitable organizations extend beyond "the prevention of fraud" or "the prevention of undue annoyance" which are typically asserted on behalf of town ordinances regulating solicitation activity. Specifically, the state regulates the conduct of charities not only to insure that donors and donees are fairly treated but also to maintain an environment of confidence and an appearance of propriety in charitable endeavors.

Historically, the states' responsibility with respect to charitable funds was to see to their "due application" and to prevent breaches of trust in their administration. More recently, the transformation of charitable fundraising from what were primarily personal, face to face appeals to sophisticated and businesslike "boiler room" and mass mail appeals has necessitated regulation aimed particularly at fundraising practices. The Maryland statute under attack in this case is one such regulation.

The Maryland statute imposes a percentage limit on fundraising expenses which has two separate and distinct applications. First the twenty-five

percent limit serves to limit the amount a charity can spend on its own fundraising expenses. Thus a charity in Maryland which is aiming to raise $100,000 should not plan to incur more than $25,000 in fundraising expense. This limit insures that money raised for charitable purposes will not be applied to wasteful and inefficient fundraising schemes. The second is well illustrated by the facts of this case. The twenty-five percent limit serves to limit the percentage compensation of a professional solicitor such as Munson. If a charity permits a solicitor to use its name to raise funds from the public then the statute prohibits it and the solicitor from agreeing that the solicitor shall retain more than 25%.

This limit insures that funds donated to a charity inure primarily to the benefit of the charity rather than serving to enrich professional solicitors.

These two types of percentage limits are a common form of state fundraising regulation. They need to be treated separately because these two applications involve different policy and constitutional considerations. See Sections III and IV below. Indeed many states have adopted different limits for these two types of expenditure. See, e.g., Mass. Gen. L. c. 68, §21 (imposes a 15% limit on compensation for a professional solicitor) and Mass. Gen. L. c. 68, §22 (sets a 50% limit on the expenses incurred in connection with

fundraising activities).[2/]

The purpose of this amici brief is to explain the states' interest in regulating charitable fundraising and to defend the two types of percentage limitations described above. While the Schaumburg decision appeared carefully written to avoid a broad declaration that certain types of charities

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2/ Conn. Gen. Stat. §21a-179 (limits professional fundraisers to between 25% and 50%); Chpt. 23, §5109(c) Ill. Rev. Stat. (1981) (after deducting reasonable expenses, up to 25% of contributions can go to the fundraiser; 75% or more must go to the charity); N.J.S.A. 45: 17A-10(a) (imposes a 15% limitation on compensation for a professional fundraiser); Tenn. Code Ann. §48-2213(k) (limits professional solicitor compensation to 15% of gross contributions); Tenn. Code Ann. §48-2213(b) (fundraising costs in excess of 25% of gross contributions create a rebuttable presumption of unreasonableness).

regulation are not constitutionally permissible, the lower courts have not followed this Court's narrow approach. One federal court has construed this Court's decision as striking down all percentage limitations, even as the Maryland court appears to have ruled in the opinion prompting this appeal. Conlon v. City of North Kansas City, 530 F. Supp. 985 (W.D. Mo., 1981). But see Holloway v. Brown, 62 Ohio St. 2865, 403 N.E. 2d 191 (1980); National Black United Fund v. Campbell, 494 F. Supp. 748 (D.D.C. 1980). See also Bread Political Action v. Federal Election Commission, 635 F. 2d 629 (7th Cir. 1980); Larson v. Valente 452 U.S. 904 (1982). One state court has even gone so far as to construe Schaumburg as

mandating invalidation of a statute which limited fundraising expenses solely by limiting the percentage compensation which could be paid to a professional solicitor. State of North Dakota v. WRG Enterprises, Inc., 314 N.W. 2d 842 (N.D. 1982). Even beyond the confusion and uncertainties caused by these court decisions, certain sections of the charitable community have become convinced that Schaumburg stands for the proposition that charitable activities (and in particular those activities associated with solicitation) are constitutionally immune from any kind of regulation. See, e.g., Suhrke, Schaumburg: A Supreme Court Reminder of Basic Values, a Layman's Appraisal of Schaumburg, PHILANTHROPY MONTHLY, March 1980, at 4,4.

The states concede that any statutory scheme which as a practical matter bars certain types of charities from soliciting contributions is constitutionally infirm. The ordinance in Schaumburg not only fell within this rule but, in barring the special speech rights of advocacy groups, did so with a vengeance. Yet condemning the Schaumburg ordinance is a far cry from giving professional solicitors such as Munson a first amendment shield against any kind of state regulation or in particular regulation aimed at limiting his fee.

While the Maryland statute derives from a Uniform Act, like any piece of legislation it has its own unique features. For example, it is not common for charitable solicitation acts to

apply a percentage limit on fundraising expenses to the "total gross income raised or received by reason of the fund-raising activity." §103D(a). Nor is it common to exclude postal costs or feasibility studies from fundraising expense. Further the standard governing administrative exceptions is not uniform among the states.[3/] These particular

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3/ In Maryland the Secretary of State may exempt an organization from the percentage limitation "in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions." §103D(a). Other states employ rebuttable presumptions that costs in excess of a certain percentage are unreasonable. See, e.g., Tenn. Code Ann. §48-2213(b). Massachusetts employs a 50% limit and confers authority upon the Director of the Division of Public Charities to permit solicitation if she finds that such would be in the public interest. Mass. Gen. L. c. 68, §22. In most states administrative decisions are subject to due process hearing rights and judicial review.

aspects of the Maryland statute are best left to the parties to the case. The states as amici will confine their discussion to general considerations governing charities regulation and the first amendment standards applicable thereto. We urge this Court in deciding this case to recognize the propriety and constitutional validity of state regulations which impose precise and narrow limits on either the fundraising expenses of charitable organizations or on professional solicitors' fees.

SUMMARY OF THE ARGUMENT

The First Amendment requires that regulation affecting speech must serve a strong state interest and be narrowly drawn to serve that interest. (pp. 14-18)

The states have a strong and traditional interest in regulating public charities. In order to promote and protect charitable endeavor, the states have a responsibility to see to the actual and apparent integrity of charitable funds. (pp. 18-26)

As applied to charitable organizations flexible percentage limitations on fundraising expenses are narrowly drawn to promote public willingness to contribute to charitable causes. (pp 26-41)

As applied to professional solicitors such as Munson, percentage limitations on their compensation only serve to limit profits and do not have any obvious impact on speech. (pp. 41-57)

ARGUMENT

I. Percentage Limitations Are Constitutional Where They Serve a Strong State Interest Unrelated to the Suppression of Speech and Are Narrowly Drawn to Serve that Interest.

When a state acts to advance a significant governmental interest by regulating conduct and where the purpose of the regulation is unrelated to the suppression of free expression, a reviewing court need not strictly scrutinize the regulation as if it were a direct restriction on free speech. A two-fold test has been applied to determine the constitutionality of regulation indirectly affecting speech. If the regulation 1) serves a strong state interest unrelated to the suppression of speech and 2) has an

"incidental restriction on alleged First Amendment freedoms ... no greater than essential to the furtherance of that (non-speech) interest... " it is constitutional. U.S. v. O'Brien, 391 U.S. 367, 376 (1968). As Justice White noted in Broadrick v. Oklahoma, 413 U.S. 601 (1973), in applying the overbreadth doctrine, the function of the doctrine:

> ... attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct - even if expressive - falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful constitutionally unprotected conduct. Although such laws, if too broadly worded may deter protected speech to some unknown extent, there comes a point where that effect - at best a prediction - cannot, with confidence, justify

> invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. Alderman v. U.S., 394 U.S. 165, 174-5 (1969). To put the matter another way, particularly where conduct and not merely speech is involved we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. 413 U.S. at 615.

In considering regulation of charitable fundraising, it is important to keep in mind this spectrum of activities. Fundraising runs the full gamut of such activities ranging from those involving pure speech to those implicating gradations of expressive conduct to pure non-expressive conduct. Under certain circumstances, solicitation is an "intertwined"

activity, involving both speech and conduct. Schaumburg, 444 U.S. at 834. Regulation of this activity may focus more on its speech elements or on its conduct elements. Obviously a statute which allowed pro-abortion groups to solicit but denied a similar right to pro-choice groups would be at the speech end of the continuum.[4/] On the other hand, limits upon the fee of a for-profit professional solicitor must be conceded to be at the extreme "conduct" end of the spectrum. Falling somewhere in between are limits upon the fundraising expenses of charitable

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4/ Indeed to the extent that the ordinance in Schaumburg functioned to bar solicitation by a type of organization exercising predominantly speech rights, that ordinance too may be placed at the "speech" end of the spectrum.

organizations. The court below totally ignored these subtle distinctions. By applying a bright line test, it failed to give adequate weight to the strong state interests served by these limits.

II. The States Have a Strong and Compelling Interest in Regulating Charitable Organizations and Charitable Fundraising; the States' Interest Relates to the Encouragement of Charitable Speech and Not Its Suppression.

Dating from the enactment of the Statute of Charitable Uses in England in 1601, the state has recognized its unique regulatory responsibility vis a vis public charities. That statute not only spelled out the specific purposes which would be deemed charitable, it also set up a series of Commissions with broad powers to investigate and redress the misapplication of charitable funds. In addition, under English common law

the Attorney General was empowered to represent the public's interest in the proper use of charitable funds.[5/] Obviously part of the purpose of these enforcement efforts was to protect donors from the waste of their funds and to ensure the beneficiaries that they would receive the benefits intended for their use. Government intervention was necessary because charitable funds are by their very nature beneficial to the indefinite public. Thus if charitable trustees were legally accountable to all their potential private beneficiaries, charitable trusts could be depleted by the assertion of duplicative or even inconsistent legal claims.

5/ This was one of the areas under the common law where the Attorney General had power to act parens patriae on behalf of the public generally.

It cannot be disputed that Parliament in enacting the Statute of Charitable Uses had more in mind than the protection of individual donors and beneficiaries. This was after all at a time when caveat emptor was the general rule and the government had only limited inclination to intervene in private transactions. Most fundamentally, the Statute of Charitable Uses represented a recognition of the importance of voluntary charitable endeavors in lessening the burdens of government and in meeting community needs. This kind of philanthropy cannot survive except in an environment where people are assured that charitable money will be spent honestly and efficiently. Thus the government has a special interest not only in the integrity of the administration of charitable funds but also in its perceived integrity. Indeed

as a result of the enactment of the Statute in 1601, the number of charities rapidly increased. See Fremont-Smith, Foundations and Government, Russell Sage Foundation, 1965, p.28.

This interest in regulating charitable funds has continued to the present day. In many states, the attorney general has both a statutory and a common law responsibility to see to the due application of charitable funds.[6/] To aid the Attorney General in the discharge of these responsibilities public charities in many states are required by statute to

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6/ See, e.g., Mass. Gen. L. c.12, §8; Conn. Gen. Stat. §3-125; Chpt. 23, 5109(c) Ill. Rev. Stat. (1981); N.Y.E.P.T.L. 8-1.4(i)(m); Tenn. Code Ann. §29-35-102 (action by District Attorney for breach of duty by trustee of charitable trust). Parker v. May, 59 Mass. (5 Cush) 336 (1850).

file annual financial disclosure statements with a state attorney general or some other state agency.[7] Other typical requirements include a general provision that a state's attorney general must be made a party to certain judicial proceedings involving charities,[8] or to probate court proceedings concerning the administration of charitable funds and bequests,[9] In addition many

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7/ See, e.g., Mass. Gen. L. c.12, §8F. Conn. Gen. Stat. §21a-177; Chpt. 23, §5104 Ill. Rev. Stat. (1981); N.J.S.A. 45:17A-6; N.Y.E.P.T.L. 8-1.4(c)(f); N.Y. Exec. L. §172 and §172-v; Tenn. Code. Ann. §48-2204(a)(6). The requirement of financial disclosure was first imposed on charities in England in 1786 by the Return of Charitable Donations Act. See Fremont-Smith, supra, at 27.

8/ See, e.g., Mass. Gen. L. c.12, §8G; N.Y.E.P.T.L. 8-1.4(e); Tenn. Code Ann. §35-1108(b)(District Attorney).

9/ See, e.g., Mass. Gen. L. c.192 and M.G.L. c.206; N.J. Supreme Court R. 4:80-8 (requires notice); N.Y.E.P.T.L. 8-1.4(e)(2).

states retain broad power to investigate the misapplication of charitable funds.[10/]

Like traditional regulation of charitable funds, state charitable solicitation acts,[11/] have the dual purpose, on the one hand, of protecting donors and donees and, on the other, of promoting the public's perception of the integrity and efficiency with which charitable funds are raised. The percentage limitations at issue here relate directly to these concerns. The existence of fundraising schemes where a

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10/ See, e.g., Mass. Gen. L. c.12, §8H, 8L; Chpt. 23, §5110 Ill. Rev. Stat. (1981); N.Y.E.P.T.L. 8-1.4(i), N.Y. Exec. L. §175(e)(5); Tenn. Code Ann. §§48-2203(c), 2209.

11/ See, e.g., Mass. Gen. L. c.68, §§18-31; Conn. Gen. Stat. §§21a 175-190; Chpt. 23, §§5101-5114 Ill. Rev. Stat.; N.J.S.A. 45:17A 1-17; N.Y. Exec. L. Art. 7(a); Tenn. Code Ann. §§48-2201 et. seq.

for-profit business receives the donation and returns only some small percentage of it to the charity obviously corrodes the public's confidence and willing participation in charitable solicitations. Equally corrosive to public participation is the growing public perception that charitable donations are used only to solicit more charitable donations in seemingly endless waves of unwelcome "junk mail."

In this respect, percentage limitations in the area of charitable fundraising have a purpose similar to the political contribution limits upheld in Buckley v. Valeo, 423 U.S. 387 (1976). In that case, the Supreme Court noted that the state had a valid interest in protecting not only against corruption but also against the

appearance of corruption:

> Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contribution. Buckley, 423 U.S. at 28.

Similarly fundraising limits do more than shield charities from abuse by professional solicitors; they actually encourage the public to give by maintaining confidence in the integrity of the system.[12] Charitable speech is not chilled by such regulation; it is nurtured.

12/ It must be emphasized that percentage limitations are not primarily anti-fraud regulation. Other provisions in state statutes typically aim at fraud and misrepresentation. Likewise in Buckley the Court upheld a campaign contribution limit even though the Federal Election Campaign Act of 1971 had partially addressed fraud by imposing extensive disclosure requirements. Buckley, 423 U.S. at 29.

III. In Evaluating Maryland's Limit on The Fundraising Expenses of Charitable Organizations the Court Below Should Have Considered the Size of the Limit, the Standards by which Expenses are Allocated to Fundraising, and the Exercise of Administrative Flexibility in Enforcing the Limit.

A. The Maryland Court Misapplied Schaumburg in Reading it to Invalidate all Percentage Limitations.

As explained above the Maryland statute can function like the Schaumburg ordinance as a limit on the fundraising expense incurred by the charity. However the Maryland statute does not have the effect on speech rights which rendered the Schaumburg ordinance unconstitutional. The ordinance prohibited charitable organizations from any solicitation in that town unless 75% of the money raised went for a charitable purpose. "Charitable purpose" was defined to exclude not only

fundraising expenses but also the administrative expenses of the charity. Further the ordinance permitted municipal officials no administrative flexibility to allow solicitation if they found the organization's fundraising expenses to be reasonable under the circumstances. The effect of the Schaumburg ordinance was an absolute prohibition on the speech of certain legitimate organizations such as Citizens for a Better Environment, the plaintiff advocacy group. That group suffered a total loss of its speech rights because part of its charitable program (the activity of its advocate solicitors) was defined as non-charitable by the town. As will be shown below no such effect is possible under the Maryland statute.

B. The Maryland Court Failed to Give Adequate Weight to the The State's Strong Interest in Regulating Fundraising Costs.

As was argued above, state regulation of fundraising costs is an instance of the state's traditional concern that charitable funds not only be well managed but also that they appear to the public to be well managed.

Charities have many different ways of raising funds. Obviously some ways are more cost-effective than others and a charity which is reasonably managed may be expected to employ the most cost-effective means first. Thus, for example an organization which wishes to raise $100,000 may well find it can raise such an amount by a single mailing to its prior donors. If it wishes to raise more money, it must mail follow-up solicitations or tap new donors. Since

these techniques are normally less cost-effective, the fundraising percentage of the organization will go up as the charity seeks to raise more and more money. Even if marginal costs are 90%, the charity's total funds are increased by ten cents for every dollar raised. Many organizations engage in so called donor acquisition campaigns where the fundraising percentage exceeds 100 or even 200%. The point of these campaigns is to identify future donors for the organization.

These considerations indicate why fundraising costs have been singled out for special attention. With respect to each charitable organization there is no economic disincentive to discontinue fundraising at any point short of a marginal percentage cost (figuring not

merely present benefit but future benefit as well) of 99.9%. A charity's interest in fundraising is typically only extinguished when it actually incurs a net cost in the process. Yet if all charities were to fundraise in this way there would be disastrous consequences. First, at some point people feel inundated by unwanted charitable solicitations. Second, as the fundraising activities of charitable organizations became more visible than their programs, public cynicism about charitable giving would increase.

Fortunately most charities do not milk the public down to the last marginal cent. Instead they undertake balanced programs which seek in efficient ways to maintain the interest of prior donors and at the same time provide for reasonable growth in the

charity's donor base. Such charities will not run afoul of a reasonable percentage limit such as Maryland's absent unusual circumstances.

The states concede that there are some circumstances when a percentage limitation could reasonably be exceeded. An extremely unpopular cause is one frequently cited example. A unique opportunity to expand one's donor base as a result of a special accomplishment is another. Whatever the reason, it is not a decision which should be entirely left to the charity. It is human nature that those in charge of charitable organizations will frequently wish to raise as much money as possible. A charity with a strained budget may not grow as quickly as its principals would like or may not have the resources to be a beneficient

employer. Therefore the decision of how inefficient marginal fundraising must become before it is abandoned may be a situation which pits the self interest of a charity against the public whose dollars it spends.

An analogy may make this point clearer. Under for-profit corporation law, certain actions must be brought to the shareholders for vote or review. Chief among these are actions in which the board or officers might be said to have a personal stake. Salaries, the powers of the board, decisions over mergers or stock issues are typically within the shareholder's domain precisely because the board may have a personal interest. A charity, instead of being accountable to private shareholders, is accountable to the indefinite public. The state has

traditionally represented that public in being sure that the charity's transactions are lawful and are not inappropriately tinged with the self-interest of its officers. A flexible state percentage limit falls within this tradition by providing for an independent state review when a charity decides because of special circumstances to spend more than a certain amount of the public's money on its own dreams of expansion.

C. A Flexible Percentage Fundraising Limit Narrowly Serves the States' Interest in Regulation.

In deciding Schaumburg, this Court seemed to indicate that a percentage limit on fundraising expenses would be constitutional under certain circumstances if the regulation included discretion on the part of some state

official to allow solicitation even if the limit were exceeded. Indeed in a footnote the Court distinguishes the Schaumburg ordinance from the one upheld in National Foundation v. Fort Worth, 415 F. 2d 41 (5th Cir. 1969) cert. denied, 396 U.S. 1040 (1970). That case dealt with an ordinance which denied the right to solicit contributions to charitable organizations with excessive solicitation costs. The ordinance deemed costs in excess of twenty percent of gross receipts unreasonable but permitted organizations which demonstrated the reasonableness of such costs to obtain solicitation permits. In Schaumburg this Court distinguished National Foundation as follows:

> Unlike the ordinance upheld in National Foundation v. Fort Worth, the Village ordinance has no provision permitting an organization unable to comply with

> the 75 percent requirement to obtain a permit by demonstrating that its solicitation costs are nevertheless reasonable ... Thus the Village ordinance effectually bars all in-person solicitation by organizations who spent more than one-quarter of their receipts in the previous year on salaries and administrative expenses. Schaumburg, 444 U.S. at 636 fn. 9.

The Maryland statute, like the one upheld in National Foundation, utilizes a flexible fundraising percentage limit. Such limits, unlike the absolute limit struck down in Schaumburg, narrowly serve the states' interest in regulating fundraising costs.

State solicitation statutes are not enacted to place unnecessary restrictions on charitable speech. As was argued above the state interest in such statutes is not to stifle the speech of organizations with fundraising costs more than 25% but to subject the decision of a charity to spend more than

that figure to the impartial review of a state official. The discretion of the state official to permit the solicitation to go forward is what prevents the statute from being overbroad.

Nor is the discretion given to state officials under charitable solicitation statutes the kind of discretion condemned in Hynes v. Mayor of Oradell, 425 U.S. 610 (1976). For one thing, it is not unbridled discretion. An organization has an absolute right to solicit so long as it keeps its costs within certain reasonable limits. It is only when that limit is exceeded that a state official decides who may solicit and even then he is bound by certain standards, e.g. whether the costs are reasonable under the circumstances. Further a state

official's decision is normally subject to court review and cannot be made arbitrarily or capriciously.

A flexible percentage limit on fundraising costs operates to keep fundraising expenses at a reasonable level while at the same time providing relief for those organizations having a special need to spend larger amounts on raising money.

D. There was No Evidence Before the Maryland Court that Percentage Limitations on Fundraising Expenses Have a Significant Impact on the Speech Rights of Charitable Organizations.

Under the O'Brien standard some incidental effects on speech are permissible where the regulation in question serves a strong state interest which is unrelated to the suppression of speech. Munson in this case has failed to demonstrate that the statute has any

effect on speech, let alone that its effect is more than incidental. The advocacy oriented organizations identified by the circuit court in the Schaumburg case constituted a significant class of organizations who were absolutely barred under the ordinance from soliciting in the town of Schaumburg. The record in this case falls far short of documenting that the Maryland statute has this kind of effect. Indeed it does not establish that even one charity has been denied its right to solicit. Even Munson's clients remain free to solicit funds.

Percentage limitations on fundraising expenses may have varying degrees of impact on the speech rights of charitable organizations. The actual number of organizations coming within the sweep of such a statute is obviously

affected by the actual percentage employed. The lower the percentage, the larger will be the number of organizations affected. The sweep of a statute will also be determined by the rules used to allocate expenses to the fundraising function. The Schaumburg ordinance had an extremely unrealistic allocation between fundraising and program. The fundraising category included administrative expenses and one hundred percent of the salaries of the advocate-solicitors. The Maryland statute on the other hand employs generally accepted accounting principles §103B(a)(6) to allocate between fundraising and program. This results in what could be characterized as an overly generous measure of program expense by permitting a portion of the salaries of the advocate-solicitors to

be allocated to program. Thus insofar as an advocate's speech is implicated, the Maryland statute permits the organization to treat its cost as program. In addition the Maryland statute excludes from fundraising expense two major items - postage (§103D(b)(2)) and fundraising feasibility studies (§103D(a)).

The end result of the Maryland allocation rules is a much less restrictive limitation than that found in Schaumburg. There is no question but that Citizens for a Better Environment could solicit in the state of Maryland. CBE's fundraising percentage was 23.3% before deducting, as Maryland would, its postage and consulting expenses. 444 U.S. 624, 627. Surely the Maryland court was in error in ruling the Maryland statute unconstitutional absent

any showing that any charitable organization would be denied its right to solicit funds.

IV. Percentage Limitations on the Compensation of Professional Solicitors are Constitutional Because They Are Mere Economic Regulation of a For-Profit Business.

A. The Maryland Statute is Constitutional as it Applies to Munson and His Charitable Clients.

The Maryland statute as applied to Munson effectively functions as a limit upon his compensation. As applied it would be subject to constitutional attack only if it could be shown that limiting what a charity can pay a professional solicitor in any way limits the charity's ability to speak its mind. The amici contend first that Munson has failed to demonstrate that such limits have any significant impact on the speech rights of charitable

organizations and that they do not operate exclusively as a control upon his own excessive profits.[13/]

13/ The speech rights at stake here are of course those of the charitable organization not those of Munson. It is possible that a person soliciting for a charity could be exercising his own speech rights rather than serving solely as a conduit for the charity's speech. Fee limits on professional solicitors do not limit those speech rights which are protected by the first amendment. In reviewing regulation of lawyers, this Court has been careful to define when a lawyer's speech rises to first amendment protection. An attorney's speech is protected where the attorney has no pecuniary interest in the speech (solicitation) and where the litigation is a form of political expression or political association. In Re Primus, 436 U.S. 412 (1977); NAACP v. Button, 371 U.S. 415 (1962). The Court declared unconstitutional the lawyer solicitation regulation in Primus primarily because there was "... no basis for equating the work of lawyers associated with the ACLU or the NAACP with that of a group that exists for the primary purpose of financial gain through the recovery of counsel fees." Primus, 436 U.S. at 431. The plaintiff Munson is very unlike Attorney Primus. Munson has a direct and substantial pecuniary interest in the solicitation he conducts and a maryinal or non-existent interest in political expression or association.

Secondly, the amici argue that even if this overcharge provision had some impact on charitable speech it is well within the bounds of permissible regulation under the standards described in Section I.

B. Munson Has Not Demonstrated that A Percentage Limit on His Compensation Has Any Significant Impact on Charitable Speech.

There is no a priori reason to believe that percentage limits upon a solicitor's compensation will affect speech rights. Nor should this Court rely upon the plaintiff's bald assertions in this regard. Indeed relying upon the representations of the plaintiff in this case would be somewhat like taking the wolf's word that the sheep are safe. There is no indication upon this record that charities are

unable to hire solicitors within the 25% limit. A similar lack of evidence was noted in Buckley v. Valeo, 424 U.S. 6 (1976), where the Court upheld a limit on individual contributions to political candidates because "there is no indication ... that the contribution limits imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations." 424 U.S. at 21.[14/]

14/ Similarly, in Person v. Association of the Bar of New York City, 554 F.2d 534 (2nd Cir., 1977) the court upheld a Bar Association rule which proscribed the payment of contingent fees to expert witnesses. It noted that the rule's "effect on first amendment rights, if any, is remote ... (it) does not deny attorneys or their clients access to the courts - it merely forces attorneys and litigants to finance the payment of experts in a manner not related to the outcome of the litigation." 554 F. 2d at 537. Likewise the Maryland statute regulates only the manner of financing speech and does not place a significant restriction on speech itself.

Likewise the Court in this case should be reluctant to hold or to suggest that a limit upon the compensation of a professional solicitor is unconstitutional absent some showing that such limits affect speech.[15/]

15/ While the burden of proof is not on the states, the amici submit two items which are highly suggestive that percentage fundraising is not important to the exercise of charitable speech rights. Exhibit A contains the Code of Ethics of the National Society of Fundraising Executives. This code bans "commission" fundraising entirely and requires its members to receive compensation "on the basis of a predetermined fee and not a percentage of the funds raised." Similarly, Exhibit B contains standards for charitable organizations promulgated by the National Information Bureau, a "watchdog" type organization which assists donors in obtaining information they need to make charitable giving decisions. The NIB standards also prohibit percentage fundraising. The fact that these industry organizations agree that a prohibition on percentage solicitation is desirable casts great doubt on Munson's claim that this kind of regulation has a significant impact on speech.

C. The States have a Strong Interest in Limiting Percentage Compensation for Professional Solicitors.

State statutes regulate professional solicitors in a variety of ways. Some provide that such solicitors shall be deemed fiduciaries for the amounts collected. Even in the absence of such a statutory provision solicitors fall into the traditional notion of a fiduciary as one who holds money for another. Statutes also frequently require that solicitors register and post a bond with a state agency. A bond is a fairly standard requirement for fiduciaries and one which is obviously aimed not only at protecting individual beneficiaries from breaches of trust but also at promoting confidence in the system. In addition, as noted above, percentage compensation for a solicitor

may be limited by state law. In a fiduciary context, external limitations on compensation are common. The reason for them is that a fiduciary's claim for compensation is the one area where he is permitted to have an interest which is adverse to that of his trust. Limits upon the compensation of a solicitor to what would appear to be a reasonable commission protect the charitable organization from overreaching conduct by solicitors and assures the public that money it donates will actually be applied to a charitable cause.

In connection with these purposes, two important points must be noted. First, it is not entirely an answer to the state's concern about the welfare of charitable organizations that the charity's own governing board has an obligation to protect the charity's

interests and that if it fails to do so the charity deserves its fate. This argument entirely overlooks the fact that charitable boards and trustees exercise their authority as stewards for the public. A failure by them to be careful and vigilant may irreparably harm the public interest.16/

16/ The irreparable nature of the public harm is well illustrated by a case recently arising in Massachusetts. In 1981, the President of the Boston Athletic Association executed a contract with one Marshall Medoff for him to solicit sponsorships for the Boston Marathon. Mr. Medoff was an immigration lawyer with little or no sports experience. The contract was executed without the knowledge or consent of the Board of Governors of the BAA but pursuant to a broad delegation of authority which may have been granted primarily as an expression of confidence in the President's personal leadership. The contract which had no fixed term provided that Mr. Medoff would pay a flat fee of $400,000 to BAA and that he could keep everything raised in excess

The second point which must be remembered is that a state may well conclude that if the purpose of limiting a solicitor's fee is to maintain confidence in the system of

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Footnote 16 (cont.)
of that amount. In 1982, this netted him over $300,000. Under Mass. Gen. L. c.68, §21 the compensation of a professional solicitor is limited to 15%. Pursuant to that section, the Director of the Division of Public Charities disapproved the contract between the BAA and Medoff. Before that had occurred however word had leaked out through the media the the Marathon had been secretly sold. The effect of these media reports were exacerbated by public statements by Medoff to the effect that the Marathon now belonged to him. Many runners and other volunteers have indicated an understandable lack of willingness to participate in the race so long as the primary beneficiary of their efforts is apparently Medoff. In the absence of a law requiring review and approval of percentage solicitation contracts it is a poor answer to the public that protection of their interest in an historic and important race is solely the province of its private part-time board.

charitable fundraising then this purpose cannot be fulfilled by mere disclosure. Indeed a state may also conclude that requiring solicitors to disclose that they themselves will keep 75% to 85% of any donation will not promote the public's willingness to involve themselves in charitable endeavors.

Lastly the states have a special interest in regulating professional fundraisers who operate for a percentage of the money raised. Most state statutes which place a limit on professional compensation make a distinction between professional solicitors who actually solicit funds for a percentage of the take and professional fundraising counsel who provide advice for a flat fixed fee. The solicitor's percentage compensation is restricted while generally the

charity may pay a fundraising counsel as much as it wishes so long as the payment is in the form of a "flat fixed fee."[17/] The reason for the distinction in treatment of the two types of professional fundraisers is that when the charity pays a flat fee, it bears a risk and must make a business judgment about the value of the services being offered. On the other hand, when a solicitor offers to run the whole fundraising campaign for a percentage, the charity may view this as "found money" in the sense that it bears no risk in obtaining it. In such cases, a charity may think it is getting the best

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17/ In Maryland, fundraising feasibility studies, the service usually provided by fundraising counsel, are not subject to the 25% limit. §103D(a).

of deals - something for nothing. Nevertheless it is a poor deal for the public which finds itself contributing primarily for private profit.

D. The Incidental Effects on Speech (if any) of Limiting Solicitor Compensation Are No Greater Than Necessary to Achieve the States' Regulatory Aim.

The regulation of professional solicitors does not place unnecessary burdens on speech. Courts have frequently held that burdens placed on speech may be necessary to fulfill the state's responsibility to maintain professional standards. The O'Brien standard has been used to uphold regulation of professionals even where there is a real burden on the most highly protected speech. See Ohralik v. Ohio State Bar, 436 U.S. 447, 460

(1978); Williamson v. Lee Optical Company, 348 U.S. 483 (1955); Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935); American Trial Lawyers v. New Jersey Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974); Gair v. Peck, 6 N.Y. 2d 97, 160 N.E.2d 43 (1959); Commission on Independent Colleges and Universities v. N.Y. Temporary State Commission, 534 F. Supp. 489 (N.D.N.Y. 1982). Indeed the Court has recognized that the regulation of professionals enjoys a special status vis a vis first amendment claims. Cohen v. Hurley, 366 U.S. 117, 124 (1961).

Percentage limitations on a professional solicitor's fee involve the same considerations and principles which have led many states and the federal government to prohibit or limit

contingency fees for lawyers under certain circumstances. For example, contingent fees have been limited or disallowed in areas where the state wishes to protect a class of litigants - such as plaintiffs in workmen's compensation actions or parties in divorce cases. Mass. Gen. L. c.152, §13 (1957); Ind. Ann. Stat. §40-1516 (1952); Del. Code Ann. tit. 19, §2126 (1953) (workmen's compensation). Mass. Supreme Judicial Court Rule 3:05 (3), Contingent Fees (divorce). In addition, general percentage limits have been placed upon the compensation a lawyer may receive. See, e.g., New Jersey Supreme Court Rule 1:21-7(c). See also the Federal Tort Claims Act, 28 U.S.C. §2678 (1970) (limits contingent fees to twenty-five percent of the administrative settlement

after commencement of court proceedings or the judgment).

These limits on contingent fees have been upheld even though they clearly have an adverse effect on the first amendment rights of some potential clients. Contingent fees allow some clients access to the courts that would otherwise not be available, ATL v. N.J. Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974); Swartz and Mitchell, An Economic Analysis of the Contingent Fee in Personal Injury Litigation, 22 Stan. L. Rev. 1125 (1970), and certainly access to the judicial system and representation by competent counsel are among the most fundamental of rights. Despite this, contingency fee limits are permitted in order to protect a lawyer's clients and to maintain the integrity

and the appearance of integrity in the legal profession.

The analogy between percentage limits on solicitors' fees and legal contingency fee regulation is particularly close. Both sets of rules regulate for-profit professions where the services performed are frequently fiduciary in nature. The percentage limits on solicitors' fees like contingent fee limits are necessary to protect vulnerable third parties from the dangers inherent in a situation where one seems to be getting something for nothing. The lure of risk-free percentage fundraising can easily induce a charity to sell its most valuable assets - its good name and its charitable appeal - to a professional

solicitor without making a reasoned financial decision.

Similarly contingency fees are attractive to some because they seem to cost the client nothing. As this Court has noted, such fees "tempt ... (potential clients) with what sound(s) like a cost-free and therefore irresistible offer." Ohralik, 436 U.S. at 467. Like contingency fees, percentage limits on the solicitor's share of the money donated to the charity should be upheld both to protect individual donors and charities and to maintain public confidence in charitable fundraising.

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals for the state of Maryland should be reversed and Munson's complaint should be dismissed.

Respectfully submitted,

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Attorney General
Commonwealth of
Massachusetts

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Massachusetts

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Contributions to the NIB

NIB depends upon annual contributions from large and small givers to finance its work to maintain and improve standards and practices in its field of philanthropy. Supporting accountability in philanthropy should be an integral part of everyone's philanthropic giving. Contributors are asked to give at a level appropriate to their giving for charitable purposes and to their commitment to maintaining standards in philanthropy.

NIB support comes from individuals, foundations, national and local business corporations, religious organizations, media, chambers of commerce, better business bureaus, government agencies and affiliates of United Way of America in communities in the U.S. and Canada.

NIB annual contribution levels are:

General Contributor	
Individual	$25 and over to $100
Business/Foundation	$50 and over to $100
Regular Contributor	over $100 to $1,000
Major Contributor	over $1,000 to $5,000
Sustaining Contributor	over $5,000

All NIB contributors will receive occasional memos and Wise Giving Bulletins containing information of interest to concerned givers.

Whatever contribution you are able to make, we warmly welcome your support to help improve the quality of philanthropy through our standard maintenance work.

Contributions to the NIB are deductible for Federal income tax purposes.

For more detailed information about the NIB, please ask for a copy of our Annual Report.

Basic Standards In Philanthropy

Philanthropic organizations have a high degree of responsibility because of the public trusteeship involved. Compliance with the following standards, with reasonable evidence supplied on request, is considered essential for approval by the NIB:

1. **BOARD** — An active and responsible governing body, holding regular meetings, whose members have no material conflict of interest and serve without compensation.
2. **PURPOSE** — A clear statement of purpose in the public interest.
3. **PROGRAM** — A program consistent with the organization's stated purpose and its personnel and financial resources, and involving interagency cooperation to avoid duplication of work.
4. **EXPENSES** — Reasonable program, management and fund-raising expenses.
5. **PROMOTION** — Ethical publicity and promotion excluding exaggerated or misleading claims.
6. **FUND-RAISING** — Solicitation of contributions without payment of commissions or undue pressure, such as mailing unordered tickets or merchandise, general telephone solicitation and use of identified government employees as solicitors.
7. **ACCOUNTABILITY** — An annual report available on request that describes program activities and supporting services in relation to expenses and that contains financial statements comprising a balance sheet, a statement of support/revenue and expenses and changes in fund balances, a statement of functional expenses, and notes to financial statements, that are accompanied by the report of an independent public accountant. National organizations operating with affiliates should provide combined or non-profit compiled financial statements prepared in the foregoing manner. For its analysis NIB may request disclosure of accounting treatment of various items included in the financial statements.
8. **BUDGET** — Detailed annual budget approved by governing body in a form consistent with [illegible]

Wise Giving

for contributors

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NIB

Not For Profit
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212-532 [illegible]

EXHIBIT A

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Wise giving is important

Americans gave an estimated $3.6 billion dollars to charitable, philanthropic and religious organizations in 1981. Most of these organizations are sound, but unfortunately some are not. A few are outright frauds. Others are guilty of mismanagement or of irresponsible use of contributed funds.

To protect their giving, many thoughtful contributors support voluntary compliance with standards of performance in philanthropy. Accountability to the public can help wise giving.

This is the NIB

Since 1918, the National Information Bureau has offered contributors an impartial advisory service reporting on hundreds of organizations that solicit contributions nationally from the general public.

NIB is a not-for-profit, independent watchdog organization to help keep philanthropies in its field true to the ideals and standards that should characterize all charitable organizations. It has not only exposed flagrant charity abuses but also has not hesitated to question the unethical practices of some of the giants in the field. NIB represents the point of view of prospective contributors in fulfilling its two-fold purpose:

- To maintain sound standards in its field of philanthropy;
- To aid wise giving through advisory reports to contributors.

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NIB reports

NIB prepares individual reports on over 300 national, not-for-profit organizations. It evaluates the agencies against NIB's eight basic standards and where feasible concludes that they meet or do not meet these standards.

NIB reports are usually four to nine pages in length with NIB's comment and conclusion on the front page. The body of each report generally contains:

- a brief statement of the agency's origin and purpose
- a description of its program activities
- a listing of its controlling Board and paid staff head
- an analysis of the agency's financial statements
- information on its tax deductibility status, salary ranges and current budget.

NIB reports about agencies with programs in such fields as:

animal protection • conservation
economics • education • health • youth
international relief and development
legal defense • minorities • social welfare

NIB does not generally undertake to report about religious, fraternal or political organizations and single or local institutions. However, NIB reports about the social welfare activities of some of these organizations and institutions which solicit contributions from the general public nationally.

NIB reports are available to the general public on written request. Up to three NIB reports may be requested at a time without charge.

Contributors to the NIB at the General level or higher may receive any number of available reports at a time, by written or telephone request.

NIB's Wise Giving Guide

NIB's Wise Giving Guide lists the agencies about which NIB prepares reports and indicates its evaluations of those agencies against NIB's standards. The Guide is published monthly to provide up-to-date evaluations. Single copies are available free on written request from the NIB.

An individual or group may purchase a single copy to be sent each month as published for $3 a year. Quantity rates are also available. (Purchases are not tax deductible as contributions.)

Contributors of over $100 may request the Wise Giving Guide be sent automatically to them monthly.

Are YOUR contribution dollars supporting . . .

. . . an organization which allows officers to use uniformed government employees to solicit the public? This practice puts undue pressure on contributors.

. . . an organization whose fund-raising expenses were recently more than 50% of contributions received and whose available assets were more than 2½ times its budget for the next year?

. . . an organization which in a recent year has only one in-person meeting of its governing body, which made payments of direct and indirect compensation to members of its Board and which owed to its Chairman about $1,000,000 on a demand basis?

PROTECT YOUR PHILANTHROPIC DOLLAR SUPPORT THE NIB

EXHIBIT B

AFFIDAVIT

OF

GAIL THACHER

NOW COMES your affiant, GAIL THACHER, who being duly sworn, hereby deposes on oath and says as follows:

1. I, GAIL THACHER, am a resident of Boston and am employed in the Development Office, Simmons College, 300 The Fenway, Boston, Massachusetts.

2. I am also a member and President-elect of the Massachusetts Chapter of the National Society of Professional Fundraising Executives.

3. Through those connections with the Society, I am aware of a Code of Ethics for fundraisers which has been developed and published by the Society.

4. The photostatic copies attached to this Affidavit are true and accurate copies of that Code of Ethics as published by the Society.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS third DAY OF February, 1983.

Gail Thacher

Then appeared personally before me the above-named Gail Thacher, known to me, who made oath to the truth and accuracy of the foregoing to the best of her knowledge and belief as her own free act and deed.

Lorna M. Lawley
Notary Public

My Commission Expires: 11/25/88

Code of Ethics and Professional Practices

Preamble

Professional fund raising executives are motivated by positive forces. By an inner drive to improve the society in which they live through the causes they serve. They seek to inspire others through their own sense of dedication and high purpose. They are committed to the improvement of their own professional knowledge and skills in order that their performance will better serve others. They recognize their trusteeship — to assure their employers that needed resources are responsibly sought and donors that their purposes in giving are honestly fulfilled. Such professionals write their own code of ethics everyday.

PROFESSIONAL FUND RAISING EXECUTIVES ACCEPT AND ABIDE BY THE FOLLOWING CODE OF ETHICS AND PROFESSIONAL PRACTICES

Members shall be responsible for conducting activities in accord with accepted professional standards of accuracy, truth, integrity and good faith.

Members shall encourage institutions they serve to conduct their affairs in accordance with accepted principles of sound business management, fiduciary responsibility and accounting procedures, to use donations only for the donors intended purposes and to comply with all applicable local, state, provincial and federal laws.

Members shall manage all accounts entrusted to them solely for the benefit of the organizations or institutions being served.

Members shall recommend to the institutions they serve only those fund raising goals which they believe can be achieved based on their professional experience and an investigation and rational analysis of facts.

Members shall work for a salary, retainer or fee, not a commission. If employed by a fund raising organization, that organization shall operate on its client-consultant relationship on the basis of a predetermined fee and not a percentage of the funds raised.

Members shall make full disclosure to employers or clients of all received compensation and relationships which might pose or appear to pose possible conflicts of interest. As fund raising executives, they will neither seek nor accept finder's fees.

Members shall hold confidential and each of their clients' records and documents acquired in the service of current or former employers and clients.

A member's public demeanor shall be such as to bring credit to the fund raising profession.

Office-Supreme Court, U.S.
FILED
APR 27 19
ALEXANDER L. STEVAS,

No. 82-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF STATE OF MARYLAND,

Petitioner,

v.

JOSEPH H. MUNSON COMPANY, Inc.,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF BOX OFFICE, INC., AS AMICUS CURIAE

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No. 82-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF STATE OF MARYLAND,

Petitioner,

v.

JOSEPH H. MUNSON COMPANY, INC.,

Respondent.

This brief amicus curiae of Box Office, Inc., submitted in support of the respondent, is filed with the consent of the parties as provided by the Rules of this Court. Letters confirming the consent of the parties have been or will be filed with the Clerk.

INTEREST OF THE AMICUS CURIAE

Box Office, Inc., is a Missouri corporation whose primary function is the provision of consulting, development, and fundraising services for labor unions and charitable and fraternal organizations. Since its organization in 1978, it has engaged in such representation in Missouri, Iowa, Indiana, Nebraska, and Minnesota.

The public relations and fundraising campaigns Box Office coordinates include the dissemination of information by which Box Office seeks to acquaint the general public with the organizations' history and objectives. Among its clients are chapters of the Paralyzed Veterans of America,[1] the Federation of Postal Police Officers,[2] several other police labor organizations, the American Legion, the Junior Chambers of Commerce, and the Kiwanis and Optimists Clubs.

As a consequence of its activities, Box Office deals on a continuing basis with state and municipal laws, exemplified by the Maryland statute at issue here, regulating the public solicitation of funds. In particular, Box Office's activities have on occasion have been affected by regulations of the proportion of money collected that may be used for expenses of fundraising, and it has experienced the significant limitations that such laws have on the ability of organizations effectively to promote their purposes and to advocate their views. Amicus therefore has a direct interest in the outcome of litigation that may implicate the constitutional validity of such laws.

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[1] The Paralyzed Veterans of America is a corporation created by act of Congress, 36 U.S.C. § 1151 (1976), whose membership is generally limited to citizens formerly on active duty in the armed services who have suffered spinal injury or disease. *Id.* § 1157. It is charged with the purpose of public advocacy and information dissemination in relevant areas of medical research and rehabilitation. *Id.* § 1153.

[2] The Federation of Postal Police Officers is the certified bargaining union for members of the United States Postal Service Security Force, which is a police agency established under authority of the Postal Service Act. *See* 39 C.F.R. §232.1 (1982).

SUMMARY OF THE ARGUMENT

The Secretary of State of Maryland (the Secretary) seeks in this case to obtain relief from the unanimous decision of the Maryland Court of Appeals declaring a provision of the Maryland charitable solicitation laws invalid under the first amendment. The provision at issue, Md. Ann. Code art. 41, § 103D (1982), prohibits the expenditure of more than twenty-five percent of funds raised for charitable purposes for the costs of fund raising.

The Secretary asserts that the respondent, Joseph H. Munson Co., Inc. (Munson), did not have standing under federal standing principles to bring his constitutional challenge, and that the Maryland courts should not, therefore, have considered the suit. Amicus focuses on the consequences that would follow from a determination that federal standing requirements were not satisfied. First, this Court would, of course, be precluded from deciding the case on the merits. But the further action advocated by the Secretary—reversing the judgment of the Maryland Court of Appeals with instructions to remand for dismissal—pays insufficient solicitude to the power of state courts to entertain actions, even those based on federal constitutional questions, which could not be presented in the federal courts. The disposition proposed by amicus—dismissing the writ of certiorari as improvidently granted—is advised by the Court's precedents and, not incidentally, gives proper recognition and deference to Maryland's policy to afford its citizens broad rights to judicial determination of constitutional questions.

On the merits, the Secretary attempts to distinguish section 103D from the fundraising regulation held unconstitutionally overbroad in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), on the ground that, unlike the Schaumburg ordinance, the

Maryland statute vests wide-ranging discretion in state officials to waive the percentage limitation in cases where the first amendment might be thought to require such a waiver. The Maryland Court of Appeals, however, authoritatively construed the exemption provisions as extremely narrow. It thus correctly held the precentage limitation itself unconstitutionally overbroad. When analyzed in light of the court of appeals' construction, it is clear that section 103D deprives advocacy and public information non-profit groups of expressive rights just as did the Schaumburg ordinance and is for the same reasons invalid. Other remedies, far short of the crude and indiscriminate approach of section 103D, and in fact already suggested by the Court in *Schaumburg*, would not only better protect the public interest in preventing fraud, but would allow the widest possible latitude to protected expression and would permit charitable organizations to select their own internal organization and approach to fundraising.

Finally, to the extent greater administrative latitude is provided by section 103D, allowing the Secretary to excuse compliance with the twenty-five percent limitation on an ad hoc basis, the section invites discriminatory application, and therefore collides with long-standing principles against the application of discretionary standards to activity protected by the first amendment.

ARGUMENT

I.

Certiorari Should Be Dismissed As Improvidently Granted If Either The Constitutional Or The Prudential Branch Of The Standing Test Is Not Met.

The Secretary, although she had earlier opined that the question was "unresolved," Reply Brief of Petitioner [on petition for writ] at 5 n.5, now asserts that "[i]t . . . is clear that state courts, just like federal courts, are bound to follow . . . [federal] standing rules when deciding federal questions." Brief of Petitioner at 20. In fact, it is the contrary proposition that is "clear." The result here is that if, as the Secretary strenuously contends, the norms of federal standing are not satisfied, the merits of the case are not subject to adjudication by this Court. In this event the practices of the Court counsel that certiorari should be dismissed as improvidently granted. Such a disposition would be particularly appropriate in this case because Maryland's internal law of standing does not so much as require the existence of an actual controversy.

The question of standing must of course be approached at the outset since it "implicate[s]" this Court's "jurisdiction to decide the case." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 260 (1977). It is by now familiar that "[t]he term 'standing' subsumes a blend of constitutional requirements and prudential considerations," *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982), the former restricting federal courts "to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate," *id.* at 473, and the latter, among other things, generally requiring a party to " 'assert

his own legal rights and interests.' " *Id.* at 474 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). In the present case the Secretary, while perhaps implicitly inviting the Court to take up the matter sua sponte, is said not to "make an issue of 'injury in fact standing.' " Brief of Petitioner at 18-19 n.12.[3] The Secretary, does, however, present a plenary challenge to Munson's standing to raise the first amendment rights of its organizational clients. *Id.* at 17-26.

It has long been established that, as fundamental concerns of federalism require, the state courts—unlike their federal counterparts, to which article III is addressed—are under no compulsion to adhere to purely federal doctrines of standing.[4] This Court has "not undertake[n] to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded as advisory." *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952).[5] *See also Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 410 (1900). When, however, the case reaches this

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[3]The Secretary may be intimating that the fact that one of Munson's clients was "reluctant" to enter into a contract with Munson as a result of Md. Ann. Code art. 41, § 103D (1982), Petition for Writ of Certiorari and Appendix at 39a, constitutes a mere "subjective 'chill' " insufficient to create article III standing. *See Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

[4]The cases cited by the Secretary in which the Court discussed third party standing issues on review of state court decisions, *see* Brief of Petitioner at 20, relate to the appropriateness of the consideration *by this Court* of the constitutional issues raised. They do not purport to dictate standing rules to the states.

[5]The essence of *Doremus*, that "[t]he courts of a state are free to follow their own jurisprudence as to who may raise a federal constitutional question," *Bateman v. Arizona*, 429 U.S. 1302, 1305 (Rehnquist, Circuit Justice) (order denying alternative application for

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Court, the inquiry shifts to a different plane, and standing becomes "a separate issue to which [the Court] must [its] independent judgment" as a matter of federal law. *Cramp v. Board of Public Instruction*, 368 U.S. 278, 282 (1961); *accord, e.g., United States v. Raines*, 362 U.S. 17, 23 n.3 (1960).[6] The Court has never departed from the *Doremus* approach, which, indeed, was unanimously reaffirmed as recently as last Term. *See Princeton University v. Schmid*, 455 U.S. 100, 102 n.* (1982) (per curiam).

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bail or stay), *cert. denied*, 429 U.S. 864 (1976), is particularly salient where, as in this case, the state court's decision affects a program wholly within the state's own domain rather than purporting to bind a federal official or otherwise to implicate an overriding interest in effective federal supremacy. *See Goldwater v. Carter*, 444 U.S. 996, 1005 n.2 (1979) (Rehnquist, J., joined by Burger, C.J., & Stewart & Stevens, JJ., concurring in the judgment) (interference with foreign policy).

[6]The Secretary's reference to the suggestion of Professor Freund that state courts be "bound by this Court's federal question standing decisions," Reply Brief of Petitioner [on petition for writ] at 5 n.5; *see also* Brief of Petitioner at 20 n.13, is unavailing. While it is true that, during the course of a spontaneous discussion, Professor Freund expressed the view that where federal standing did not appear "the petition should stand dismissed in the state court and the decree vacated so that it would not be a precedent even in the state court," he at once made clear that his opinion was based on "disagreement with the Doremus case," which, he recognized, "lets the state judgment stand and merely declines review." *Supreme Court and Supreme Law* 35 (E. Cahn ed. 1954) (remarks of Paul A. Freund).

Justice Harlan, too, noted that the Freund proposal "would demand partial reconsideration" of *Doremus*, along with such other decisions as *Cramp* and *Raines*. *Flast v. Cohen*, 392 U.S. 83, 132 n.22 (1968) (Harlan, J., dissenting). This, of course, has not occurred. *See Princeton Univ. v. Schmid*, 455 U.S. 100, 102 n.* (1982) (per curiam) (citing *Cramp* and *Raines*).

The fact that the Secretary's formal claim relates to the prudential branch of standing, the "third party standing rules," Brief of Petitioner at 20, and not to the irreducible minima of article III, *but see supra* p. 6 & note 3, does not affect the analysis. For both "[t]he constitutional *and* [the] prudential considerations . . . respond to concerns that are peculiarly federal in nature." *Arlington Heights*, 429 U.S. at 262 n.8 (emphasis added). Thus in *Tileston v. Ullman*, 318 U.S. 44 (1943), the Court—without finding it necessary to "consider whether the record shows the existence of a genuine case or controversy"—dismissed an appeal from a state court because the appellant sought to raise only the rights of third parties. *Id.* at 46.

Maryland's rules of standing differ significantly both in concept and operation from those applicable in the federal courts.[7] It is, in any event, irrelevant whether the Maryland

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[7] The Secretary claims that "Maryland courts apply the very same restrictive rules on third party standing articulated by this Court," and posits this as a reason why "this Court should not hesitate to apply its third party standing rules to this case" and reverse the judgment with instructions to remand for dismissal. Brief of Petitioner at 21. Her excursion into state law is not only plainly beside the point, but is also based on a highly dubious premise.

Since the Maryland Constitution "contains no express language limiting the judicial power to 'cases' or 'controversies,' " *Reyes v. Prince George's County*, 281 Md. 279, 290, 380 A.2d 12, 18 (1977), the courts of that state are "under no external edict to restrict [their] activity" to matters that would be deemed justiciable in the federal courts. C. Brown, *Introduction to Maryland Civil Litigation* § 1.51, at 42 (1982) [hereinafter cited as *Maryland Civil Litigation*]. In sharp contrast to federal practice, insofar as the Maryland Court of Appeals is concerned "there is no constitutional bar to our rendering an 'advisory opinion' " to dispose of, for example, "cases in which, because the action is moot or collusive, there is no actual controversy between the parties to the court." *Reyes*, 281 Md. at 298-99, 380 A.2d at 23.

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Court of Appeals " 'felt compelled by what it understood to be federal constitutional considerations' to apply the standing rules the way it did." Brief of Petitioner at 21. The cases in which this Court has relied upon the fact that a state court acted under such constitutional compulsion as a basis for reviewing the merits of a judgment, *e.g.*, *South Dakota v. Neville*, 103 S. Ct. 916, 919 n.5 (1983); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977), have involved state courts' upholding of asserted *substantive* rights, not their decision to accord standing to raise those rights. It could not be otherwise, since, as has been noted, this Court is precluded from assuming jurisdiction of the merits of a case unless it first independently satisfies itself of the existence of standing.[8]

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Thus where, as here, a party "elect[s] to raise . . . federal constitutional questions in a state court," if he has "standing under the law of Maryland to bring the suit, it is irrelevant that the result might have been different had the action been instituted in a federal court." *Murray v. Comptroller of the Treasury*, 241 Md. 383, 392, 216 A.2d 897, 902, *cert. denied sub nom. Cree v. Goldstein*, 385 U.S. 816 (1966). Even in situations in which the Maryland Court of Appeals may appear implicitly to import into state law federal standing doctrine, the court, exhibiting an entirely permissible "reluctance to refrain from exercising judicial power," *Maryland Civil Litigation* § 1.51, at 43, may express doubts as to the presence of standing but go on to decide the merits anyway. *E.g.*, *Clark v. State*, 284 Md. 260, 265-66, 396 A.2d 243, 247, *cert. denied sub nom. Stutzman v. Maryland*, 444 U.S. 858 (1979). *See also Kinsley v. Governor of Md.*, 289 Md. 620, 632, 426 A.2d 908, 915 (1981) (merits decided in moot case).

[8] A different situation is of course presented when a state court's *refusal* to find standing results in its failing to afford a remedy for an alleged violation of a federal right. *See, e.g., Allied Stores v. Bowers*, 358 U.S. 522, 525-26 (1959).

Doremus and *Princeton* came to this Court by way of appeal, and in both cases the appeals were dismissed. *Doremus*, 342 U.S. at 435; *Princeton*, 455 U.S. at 103. In light of the admonition of *Doremus* that the Court simply "cannot accept as the basis for review" a case that does not meet the requisites of federal standing, 342 U.S. at 434, the analogous course in a certiorari case would be to dismiss the writ as improvidently granted. *Cf. Cheaney v. Indiana*, 410 U.S. 991 (1973) (mem.) (certiorari denied "for want of standing," citing *Doremus*). *See generally Wolf v. Weinstein*, 372 U.S. 633, 636 (1963) (certiorari dismissed as improvidently granted where "no federal question of substance" was presented); *Benz v. New York State Thruway Authority*, 369 U.S. 147, 147 (1962) (per curiam) (same).

II.

In View Of Its Construction Of Section 103D, The Maryland Court Of Appeals Was Correct In Holding That The Section Is Overbroad, And That It Violates The Expressive Rights Of Advocacy And Public Information Organizations; Alternative Regulations Far Less Intrusive Of First Amendment Rights Would Better Accomplish State Objectives.

In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the Court struck down as overbroad a municipal regulation imposing a twenty-five percent limit on the application of funds raised for charitable purposes to expenses. Nevertheless, the Secretary argues that Maryland's twenty-five percent ceiling on the application of funds raised for charitable

purposes to non-charitable expenses, Md. Ann. Code art. 41, § 103D (1982), is not overbroad, for three reasons. First, because section 103D does not require that solicitors be licensed, and adherence to the twenty-five percent limit is therefore not a condition to receiving a license, it is said that section 103D is not a prior restraint and may not, consequently, be examined under the overbreadth doctrine. Second, the Secretary argues that the burden imposed by section 103D is far less substantial than that created by the Schaumburg ordinance, both because the calculation of the twenty-five percent limitation is based on different factors and because the limit may be waived under certain circumstances. Third, the Secretary asserts that the percentage limitation furthers significant state interests in a manner sufficiently precise to satisfy first amendment requirements.

While Maryland's limitation is, in some respects, a variation on the *Schaumburg* model, its differences hardly make up for the constitutional shortcomings found in *Schaumburg*. The Secretary's attempt to elevate the differences to the constitutional plane depends more on the dogged repetition of words like "moderate," "flexible," and "reasonable" than it does on analysis of the operation and effects of the statute.

There is no real disagreement between the parties about the standards for evaluating overbreadth once it is determined that the doctrine should be applied. Both recognize that, when a governmental entity imposes a "direct and substantial limitation on protected activity . . . [it] cannot be sustained unless it serves a sufficiently strong, subordinating interest" that the state is "entitled to protect." *Schaumburg*, 444 U.S. at 636. Moreover, the regulations are valid only if they are "narrowly drawn" and "designed to serve [state] interests without unnecessarily interfering with First Amendment freedoms." *Id.* at 637. In this

realm, "[p]recision of regulation must be the touchstone . . . ." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

It is in her proposed application of these well known principles that the Secretary errs. First, there is no basis for her attempt to distinguish *Schaumburg* on the ground that "the Schaumburg ordinance required every charitable organization soliciting funds door-to-door to apply for a permit 'prior to such solicitation' [,444 U.S. at 623, while] the Maryland statute requires no permit . . . ." Brief of Petitioner at 29. The Secretary is simply incorrect in suggesting that the permit requirement played any part in the Court's decision in *Schaumburg*; nor did the permit requirement lead the Court to view the case as involving a prior restraint.[9] It was the imposition of the overly broad condition rather than the timing of its application that invoked the overbreadth doctrine. Most overbreadth cases involve after-the-fact enforcement of laws limiting speech, *e.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Button; Thornhill v. Alabama*, 310 U.S. 88 (1940), and the Court has never drawn a distinction for purposes of overbreadth analysis based on when a condition is enforced in relation to the speech.

The Secretary's confusion about the relationship between the overbreadth and prior restraint doctrines carries over to her discussion of the extent to which the Maryland statute imposes a "direct and substantial

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[9]The Secretary places considerable emphasis on the portion of the Schaumburg ordinance that required a license to be denied to a person "not of good character and reputation." 444 U.S. at 622. However, like the requirement that a license be obtained prior to solicitation, the character and reputation provision was quoted by the Court only as descriptive of the Schaumburg ordinance. Whatever may be the validity of such a provision, its presence was not at issue in *Schaumburg*, and it assumed no significance in the decision in the case.

limitation on protected activity." *Schaumburg*, 444 U.S. at 636. Whether or not a solicitation law requires a permit in advance is irrelevant to the directness or substantiality of the burden on protected activity. Instead, the proper question is whether the law precludes certain organizations from engaging in protected expression, or whether it infringes on the rights of non-profit organizations to decide for themselves the manner in which they wish to conduct fundraising and advocacy. 444 U.S. at 636-37.

In *Schaumburg*, the Court identified a class of organizations that would be severely circumscribed in their expressive activity by a percentage limitation on fundraising costs, those "that are primarily engaged in research, advocacy or public education and that use their own paid staff to carry out these functions as well as to solicit financial support." Despite the assertions of the Secretary to the contrary, section 103D substantially affects precisely the same class of organizations as did the ordinance in *Schaumburg*.

In fact, the Secretary passes quickly by any argument that such organizations are protected under section 103D as it has been construed by the Maryland Court of Appeals. Instead, she claims that a number of administratively-created exemptions diminish the impact of section 103D enough to take it beyond the reach of the overbreadth doctrine. The exemptions, which the Secretary describes perhaps too often as reasonable and flexible,[10]

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[10] *Schaumburg* distinguished the ordinance in *National Found. v. City of Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970), on the ground that the Fort Worth ordinance allowed an organization exceeding a percentage limit on fund-raising costs "to obtain a permit by demonstrating that its solicitation costs are nevertheless reasonable." *Schaumburg*, 444 U.S. at 635 n. 9. The Secretary inaptly tries to transform the distinction in footnote 9 into

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still do not obviously protect the organizations described in *Schaumburg*, and, because they vest excessive discretion in the Secretary of State, pose a set of constitutional problems of their own. *See infra* pp. 18-22. In any event, the administrative regulations may not be viewed as affecting the constitutionality of section 103D because the Maryland Court of Appeals has already determined that the Secretary of State, in promulgating regulations for permits waiving the 25 percent expense limitation, "is confined to 'those instances where the 25% limitation would effectively prevent the charitable organi-

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an outright approval of *National Foundation*. Moreover, *National Foundation* rests upon a fundamentally flawed premise that "[n]o constitutional right exists to make a public solicitation of funds for charity," 415 F.2d at 45, a statement directly contrary to *Schaumburg*. 444 U.S. at 633. Based upon that premise, *National Foundation* used an inappropriate standard for examining the constitutionality of the Fort Worth ordinance, holding that the plaintiff had the "burden of establishing that the ordinance did not rest on any reasonable basis" and that a strong presumption of constitutionality should be accorded the ordinance. 415 F.2d at 45. The most that may be said about footnote 9 in *Schaumburg* is that the *National Foundation* limitation might be salvable from overbreadth; but to include an undefined exemption from the percentage limitation would be simply to trade overbreadth for vagueness. *See Aptheker v. Secretary of State*, 370 U.S. 500, 515-17 (1964).

Even more questionable is the Secretary's reliance on *Larson v. Valente*, 102 S. Ct. 1673 (1982). *See* Brief of Petitioner at 26, 31. The only issue in *Larson* was the validity under the establishment clause of a selective exemption of only some churches from the requirements of the Minnesota Charitable Solicitations Act. No other provisions of the Act were briefed or considered by the Court, and its passing reference to even-handed regulation of charitable solicitation may hardly be taken as a blanket endorsement of every detailed provision of the Minnesota Act.

zation from raising contributions.' " Petition for Writ of Certiorari and Appendix at 21a.[11]

Organizations engaged in public advocacy might, in theory, segregate fund-raising activities from public information activities, and employ low-cost methods of fundraising. They would, however, not be permitted under section 103D to continue to function as they have in the past, using paid solicitors who combine "the solicitation of financial support with the 'functions of information dissemination, discussion and advocacy of public issues.' " *Schaumburg*, 444 U.S. at 635. There is no sufficient reason for the state to intervene so drastically in the internal affairs of organizations engaging in protected expression. Not only would the division of functions apparently mandated by section 103D require hiring more individuals and expending more money, first to canvass by mail, telephone, or in person for fund-raising purposes, and then for the charitable purpose of disseminating public information, but it would interfere with a fundamental aspect of the communications between advocacy groups and the public. The request for funds should coincide

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[11] The limitation set forth in the Code of Maryland Regulations must be identical in impact to that of § 103D, and permits an exception to the 25% percent limitation if "necessary to the accomplishment of the organization's charitable purpose and [if] . . . there is no other reasonable alternative." Md. Admin. Code tit. 01, § 02.04.05(B)(1) (1982). The code also provides, by way of example, two situations in which a waiver would be appropriate and which therefore illustrate that § 103D and the accompanying regulations are not intended to protect, and are not capable of protecting, groups of the kind described in *Schaumburg*. *Id.* § 02.04.05(B)(2)(a) allows an exemption in the face of "extraordinary, unusual and non-recurring circumstances," and *id.* § 02.04.05(B)(2)(b) permits costs in excess of 25% when "an organization is less than 2 fiscal years old and in the development stage." Thus it is clear that established organizations consistently engaged in advocacy activities are not contemplated to qualify for an exemption.

with the public information aspect of the organization's work not only because the ideas expressed may provide the impetus for the contribution, therefore increasing the amount of funds raised, but because the contribution itself is an expression of support of and commitment to the views expressed.[12] Moreover, each organization should be as free as possible, consistent with protection of legitimate and substantial state interests, to choose its own form of organization and methods of fundraising. While well-known and non-controversial groups with large numbers of readily available volunteers, such as the Girl Scouts, might naturally operate within the limitations established by section 103D, groups without a large volunteer base or without a well established reputation would find it impractical to do so.

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[12]The practical relationship between the amount of donations received and the ability to engage in advocacy was well expressed in *Buckley v. Valeo*, 424 U.S. 1 (1976):

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id. at 19. Indeed, the Court emphasized that a contribution itself "serves as a general expression of support for a candidate and his views." *Id.* at 21.

Nor is section 103D narrowly tailored to legitimate state objectives. Much like the Village of Schaumburg, the Secretary claims that section 103D is necessary to prevent fraud or to ensure that charities are encouraged to expend funds for what the state deems appropriate purposes.[13] The simple answer is that the less restrictive alternatives suggested by the Court in *Schaumburg*—public disclosure of finances of charitable organizations and criminal prosecution of actual fraud—are far better suited to the accomplishment of these state objectives and to the furtherance of the public interest. For organizations engaged in outright fraud, superficial compliance with a percentage limit on fundraising costs would appear to pose no more of a problem than the more fundamental misrepresentation about the ultimate destination of the funds raised. To the extent the state's concern is with inefficient fund-raising practices or wasteful administration of the charitable organization itself, the answer seems to lie in the disclosure provisions discussed in *Schaumburg*, 444 U.S. at 638 & n.12, which permit prospective donors to decide for themselves whether the funds they give will be used to the extent they wish for the cause they support.

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[13] The few scientific studies of charitable contribution patterns and fundraising practices have failed to disclose any relationship between percentage limitations on fundraising costs and the percentage of funds raised use to pay such costs, much less any relationship between such percentage limitations and fraud. *See, e.g.*, Boyle & Jacobs, *Fund Raising Costs*, Philanthropy Monthly, Apr. 1979, at 5.

III.

The Standard For Granting Or Denying Waivers From The 25% Limitation Contravenes The First Amendment.

Apart from the Secretary's fallacious contention that the exemption lops off the overbreadth that was fatal to the Schaumburg ordinance, the provision creates a first amendment pitfall of its own by granting excessive discretion to a state official. This problem was recognized by the Maryland Court of Appeals. Petition for Writ of Certiorari and Appendix at 20a. The court was plainly correct. The first amendment requires that a permit system that purports to license the exercise of freedom of expression in a public forum[14] must contain "narrow, objective, and definite standards to guide the licensing authority" in order to be constitutional. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). "The

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[14]Expression in a special environment such as a military base which is outside the "public forum" is governed by quite different standards. *See, e.g., Brown v. Glines*, 444 U.S. 348, 356-58 (1980). Since, however, the statute at issue governs expression regardless of its location, it clearly regulates speech within the public forum. *See, e.g., Martin v. City of Struthers*, 319 U.S. 141, 145-46 (1943) (house-to-house canvassing); *Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (opinion of Roberts, J.) (expression in public streets and parks). For this purpose even expression on private property is speech within the "public" forum protected as against state action inasmuch as the state is not seeking to protect the privacy or property of the owner, the only special governmental interests stemming from expression on private property. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (general first amendment standards applied to speech at private farm). But even if different rules were applicable to expression on private property, the statute could still be attacked "on its face [because it] regulates the use of both public and private property." *Dulvaney v. Municipal Court (People)*, 11 Cal. 3d 77, 87, 520 P.2d 1, 8, 112 Cal. Rptr. 777, 784 (1974).

reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, (1975).[15]

One of the central purposes of the first amendment was to free expression from "the power of the licensor"; unless a law narrowly bounds that power, it "restore[s] the system of license and censorship in its baldest form." *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938). Therefore, "[a] licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited . . . to consideration of public safety and the like." *Niemotko v. Maryland*, 340 U.S. 263, 282 (1951) (Frankfurter, J., concurring).

Repeatedly, therefore, laws or systems requiring permission for activity protected by the first amendment have been held to be facially unconstitutional if the permission does not issue "as a matter of course" and if its issuance or denial requires "appraisal of facts, the exercise of judgment, and the formation of an opinion." *Cantwell v. Connecticut*, 312 U.S. 296, 305 (1940).[16]

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[15] In addition, "[a]ntipathy to the mere existence of censorial power must play some role." *International Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809, 823 n.10 (5th Cir. 1979) (Goldberg, J.).

[16] These principles are illustrated by this Court's most recent decision holding a regulation requiring official permission to engage in communicative activity to be unduly discretionary, *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976). There an ordinance which required a solicitor to " 'notify the Police Department, in writing, for identification only,' " *id.* at 621, was held to "give [the] police the *effective* power to grant or deny permission" to control the expression of ideas and thus to suffer "in its practical effect from the vice condemned" in the cases discussed herein, *id.* at 622 (emphasis in the original), because it failed to state "what must be set forth in the notice or what the police will consider sufficient as "identification." *Id.* at 621. If such familiar terms as "notice" and "identification" do not pass muster as standards, then the range of permissible discretion is indeed narrow to the point of invisibility.

The system employed by Maryland to issue or to deny exemption from the 25% limitation sadly lacks the "[p]recision of regulation" that "must be the touchstone" when first amendment rights are involved. *See NAACP v. Button*, 371 U.S. 416, 438 (1963). Indeed, the power exercised here by the Secretary of State requires a high degree of judgment and therefore creates a grave, and unacceptable, risk of censorship.

The statutory provision simply directs the Secretary to "issue rules and regulations to permit a charitable organization" to exceed the percentage limitation if it "would effectively prevent the charitable organization from raising contributions." Md. Ann. Code art. 41, § 103D (1982). The rules do not content themselves with stating circumstances under which the limitation may be exceeded, however. In each instance in which an organization "expects to exceed or does exceed the 25-percent limitation," it must "file a request for a waiver . . . *before* further engaging in solicitation." Md. Admin. Code tit. 01, § 02.04.05(B)(3) (1982) (emphasis added). Thus, despite the Secretary's protestations, Brief of Petitioner at 29-30, a system closely resembling those found wanting in such cases as *Cantwell* and *Schneider v. State*, 308 U.S. 147, 164 (1939), both of which involved regulations of solicitation, is employed.

A waiver request will be granted "upon a showing that it is necessary to the accomplishment of the organization's charitable purpose and that there is no other reasonable alternative." Md. Admin. Code tit. 01, § 02.04.05(B)(1) (1982). Both portions of the standard require judgmental determinations that are anything but guided by narrow, objective, and definite standards. The Secretary's repeated characterization of the standard as "*flexible*," *e.g.*, Brief

of Petitioner at 31 (emphasis in the original), only serves to emphasize the problem.[17]

What is "necessary" is in the eye of the beholder. A zealous charitable administrator might believe that raising every dollar possible, no matater what the cost, is necessary to the accomplishment of his organization's purpose. On the other hand, an equally zealous official might well believe that a waiver of the limitation is necessary in that sense only if the organization would otherwise become bankrupt forthwith. Between these extremes, what might be necessity to one administrator might be mere convenience to the next.[18]

Likewise, "that there is no other reasonable alternative" is a matter hardly free from doubt. Is abjuring the use of professional fundraisers in favor of member-conducted campaigns an alternative? What if the organization is the Paralyzed Veterans of America, whose members are necessarily confined to wheelchairs?[19] What makes an alternative "reasonable"?

These determinations are no more exact or guided than those the Court has previously condemned. Determining, for instance, what is necessary to the accomplishment of a particular purpose is no more easily done than determining

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[17]This is particularly apparent if the Secretary's contention that "the regulations provide no limit on the circumstances justifying waiver," *id.* at 33, can be taken seriously as a matter of state law in the face of the court of appeals' construction of the statute. *See* Petition for Writ of Certiorari and Appendix at 20a.

[18]*Cf. M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (1819) ("The word 'necessary' . . . has not a fixed character peculiar to itself. It admits of all degrees of comparison . . . . A thing may be necessary, very necessary, absolutely or indispensably necessary.").

[19]*See* 36 U.S.C. § 1147 (1976).

whether a cause is "a religious one." *See Cantwell*, 310 U.S. at 305. Determining that there is no other reasonable alternative is no easier than determining an applicant's "good character." *Schneider*, 308 U.S. at 165. And neither determination is nearly so simple as determining whether there has been "notice" or "identification" by a solicitor. *Hynes v. Mayor or Oradell*, 425 U.S. 610, 622 (1976).[20]

Thus, the waiver system employed to allow exemptions from the percentage limitation is rife with discretion. Consequently, the system is "invalid on its face." *Lovell*, 303 U.S. at 451.

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[20]If anything, the exemption provision in the ordinance at issue in *National Found. v. City of Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert., denied*, 396 U.S. 1040 (1977), is even more obvious discretionary, and hence more clearly invalid on this ground, than that involved here. The explicitly open-ended requirement of "special facts and circumstances . . . showing that a cost higher than twenty percent is not unreasonable," *id.* at 46, leaves the matter wholly in the hands of the government.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted or, in the alternative, the judgment of the Maryland Court of Appeals should be affirmed.

April 25, 1983

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Office-Supreme Court, U.S.
FILED
APR 22 1983
STEVAS,
CLERK

No. 82-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF STATE OF MARYLAND,
Petitioner,

v.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF *AMICUS CURIAE* ON BEHALF OF INDEPENDENT SECTOR; NATIONAL HEALTH COUNCIL, INC., REPRESENTING MEMBER VOLUNTARY HEALTH AGENCIES; AND MEMBER ORGANIZATIONS OF INDEPENDENT SECTOR INDIVIDUALLY IN SUPPORT OF RESPONDENT *

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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SECRETARY OF STATE OF MARYLAND,
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JOSEPH H. MUNSON COMPANY, INC.,
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On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF *AMICI CURIAE*

This brief *amicus curiae* is submitted by Independent Sector [1] on its own behalf; the following Independent Sector member organizations individually: American Red Cross, Association of Governing Boards of Universities and Colleges, Camp Fire, Inc., Council for Financial Aid

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[1] Independent Sector was formed in 1980 to preserve and enhance this Nation's tradition of giving, volunteering, and not-for-profit initiative; its 450 members and affiliates include many of the major philanthropic and voluntary organizations in the country. Independent Sector acts in this matter through its board of directors; its joining in this brief does not imply that each of its member organizations has taken a position on the questions presented here.

to Education, Izaak Walton League of America, Lutheran Council in the U.S.A., National Association of Independent Colleges and Universities, National Board of YMCAs, National Conference of Catholic Charities, National Council of the Churches of Christ in the U.S.A., and the National Mental Health Association; and the National Health Council, Inc., representing the following member voluntary health agencies: American Cancer Society, American Diabetes Association, American Lung Association, American Red Cross, Arthritis Foundation, Committee to Combat Huntington's Disease, Cystic Fibrosis Foundation, March of Dimes Birth Defects Foundation, Muscular Dystrophy Association, National Council on Alcoholism, National Easter Seal Society, National Foundation for Ileitis & Colitis, National Hemophilia Foundation, National Kidney Foundation, National Multiple Sclerosis Society, and National Society to Prevent Blindness on the side and in support of respondent Joseph H. Munson Company, Inc.

INTEREST OF *AMICI CURIAE*

The *amici* are all public charities as defined in the Internal Revenue Code. 26 U.S.C. § 509 (1976 & Supp. V 1981). They rely primarily on the general public for the support of their activities. The significant cuts in the availability of government support for these activities, as the federal government seeks to transfer responsibilities to the private sector, and the reductions in direct government support for the clients of some of these activities have increased the demand on voluntary organizations, which have in turn sought to establish a broader base of charitable contributions. *See* President's Task Force on Private Sector Initiatives, *Building Partnerships* (1982); L. Salamon & A. Abramson, *The Federal Budget and the Nonprofit Sector* (1982). The marginal cost of expanded fund raising endeavors has increased correspondingly.

The *amici* in effect stand in the place of the fraternal police associations that were discouraged by the Maryland law here at issue from contracting with the respond-

ent for charitable fund raising support, but chose not to intervene. The issue that primarily concerns the *amici* is the limitation on fund raising costs incurred by charitable organizations themselves—an issue that is before the Court in this case without regard to the identity of the respondent, in the same fashion that the Court accepted and determined the issue in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980).

The *amici* are particularly aware that "the costs incurred by charitable organizations conducting fund raising campaigns can vary dramatically depending upon a wide range of variables, many of which are beyond the control of the organization." *Id.* at 637 n.10.

The *amici* are concerned that a new or unpopular organization, or an established organization using a new and untried or simply more expensive fund raising technique to sustain its revenues may transgress a percentage limitation and be subject to administrative discretion as to the reasonableness of these expenditures, in an area where there are no objective guideposts. The *amici* believe, in the last analysis, that the reasonableness of marginal costs cannot be judged without judging the worthiness of the cause.

This concern is exacerbated by the language of the Maryland statute, which permits waiver only in cases where the 25 percent limitation would "effectively prevent the charitable organization from raising contributions." Md. Ann. Code art. 41, § 103D(a) (1978). The statute thus seems to preclude efforts to raise funds by new methods or on a wider scale. The criminal sanction attached to the Maryland statute would force the *amici*, in their normal course of business, to treat it as a prior restraint.

The *amici* have another concern. The crazy quilt of state legislation regulating the cost of charitable solicita-

tion is apparent from the tabulation in the appendix to this brief.[2] Twenty-four States have some form of percentage limit on fund raising costs. *See infra* app. A compilation of local ordinances—like those tested in *National Foundation v. City of Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970), and *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981)—would require a computer. *See, e.g.*, Brief *Amicus Curiae* of Coalition of National Voluntary Organizations *et al.* app. B at 4a-7a, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 610 (1980). If the Maryland statute is found to be constitutional, the *amici* can expect to have to undertake an enormous volume of *nisi prius* and appellate litigation in order to continue to conduct their national fund raising campaigns in the face of statutes and ordinances that may be even more restrictive than the Maryland statute in the scope of their exceptions from an arbitrary rule, either in the formulation of the exception, or in its application.

SUMMARY OF ARGUMENT

A state may not regulate activities of charitable organizations beyond its historic *parens patriae* functions, which are limited to preventing use of gifts in a fashion inconsistent with the will of donors who cannot continue stewardship and denying charitable form to organizations whose goals are contrary to public policy. A statute that imposes a criminal penalty on a charity spending more than 25 percent of receipts on fund raising costs limits the charity's efforts to seek support for bona fide charitable endeavors whose nature and purposes are fully dis-

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[2] This patchwork effect is the opposite of the situation described in Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 128 (1978), where the Court observed, "The evil that appellants perceive in this litigation is not that the several States will enact differing regulations, but rather that they will all conclude that divestiture provisions are warranted."

closed, and therefore exceeds the traditional limit of government responsibility.

Petitioner's expansion of *parens patriae* beyond its historic bounds, in a fashion never judicially sanctioned, does not advance a state interest compelling enough to justify infringement of first amendment rights. Nor is the statute saved by its narrow exception and waiver scheme. Exercise of first amendment rights cannot be subject to official discretion. The mere grant of authority to censor unpopular speech is an unconstitutional restraint, whether abused or not.

Costs of raising funds in excess of the 25 percent limitation can arise in several ways, none of which provides an adequate, independent rationale for the rule. Unexpected external events can subject an organization to criminal liability despite the best intentions of fund raising planners. Discouraging inefficiency as justification for an arbitrary limit invites administrative inquiry into an organization's charitable and educational means and ends. Finally, an organization should be free to pursue stubbornly an unpopular but legitimate charitable objective, free from second-guessing by state authorities.

Petitioner's emphasis on the liberality of the statute's implementation thus far is misplaced. The statute and regulations, taken together, allow for only two of the many situations in which high fund raising costs are reasonably foreseeable. The statute does, however, allow unacceptable, case-by-case intervention in the internal affairs of charitable organizations whenever a waiver is required. "[S]olicitation is characteristically intertwined with informative and perhaps persuasive speech . . . ." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 610, 632 (1980). Administrative discretion to permit or deny the cost of fund raising above an arbitrary level inevitably involves administrative judgment about how much effort should be spent on the propagation of an idea.

ARGUMENT

I. THE *PARENS PATRIAE* RESPONSIBILITIES OF STATE GOVERNMENT TOWARD CHARITABLE ORGANIZATIONS DO NOT JUSTIFY GOVERNMENT CONTROL OF THE COST OF CHARITABLE FUND RAISING.

The responsibility of the state for supervision of charitable organizations can be traced back at least to the Statute of Charitable Uses, 43 Eliz., ch. 4 (1601) (*see Trustees of the Philadelphia Baptist Association v. Hart's Executors*, 17 U.S. (4 Wheat.) 1, 36-38 (1819)). The individual philanthropist is using his own resources, but the managers of a charitable organization are using other people's resources, and the donors may not be able to see to it that their resources are used for the purposes they intended, either because they are deceased, or because there are too many of them, and they cannot maintain a continuing stewardship. Thus the state must assume a protective role. The state may ensure that donated funds are not diverted for purposes unrelated to the charitable ends for which the contributions were intended. This is the traditional function of the state in relation to charitable enterprises. There is another *parens patriae* function in this area. The state may deny the charitable form to organizations whose purposes are unlawful or contrary to public policy. This is a narrowly limited exception, limited by the scope of the first amendment.[3]

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[3] The Attorney General of Massachusetts, writing on behalf of nine State governments, asserts that "certain sections of the charitable community have become convinced that *Schaumburg* stands for the proposition that charitable activities (and in particular those activities associated with solicitation) are constitutionally immune from any kind of regulation." Brief for the States of Connecticut *et al.* at 9 (citing only Suhrke, *Schaumburg: A Supreme Court Reminder of Basic Values*, PHILANTHROPY MONTHLY, March 1980, at 4). This astonishing statement is unsupported by the authority cited. Indeed, Suhrke acknowledges, "A key holding of the Court

But what the state cannot do is limit the efforts of individual organizations to seek public support for bona fide charitable endeavors, whose nature and purposes are fully disclosed. If a fully informed public chooses voluntarily to contribute to a hopeless cause, like the elimination of slavery, or the enfranchisement of women, by what leave can the state step in?

The dangers in allowing the state to intervene in fund raising efforts are illustrated in the brief *amicus curiae* filed by the Attorney General of Massachusetts on behalf of nine States in support of petitioner. The brief describes the procedures by which charitable organizations engage in so-called donor acquisition campaigns, seeking to add to their existing membership "where the fundraising percentage exceeds 100 or even 200%." Brief for the States of Connecticut *et al.* at 29. The brief argues, "A charity's interest in fundraising is typically only extinguished when it actually incurs a net cost in the process. Yet if all charities were to fundraise in this way there would be disastrous consequences." *Id.* at 30.

The picture of all, or substantially all charitable organizations exhausting their managerial resources—and the public's patience—by seeking the last dollar of contributions seems a bit overdrawn. But charitable organizations are forced to seek additional funds to fill the gap created by government funding cutbacks. Who should determine which organization may go how far in "donor acquisition"? If the Attorneys General of nine States believe they are entitled to exercise such power, then the restraining hand of this Court is badly needed.

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which must not be overlooked . . . is [*Schaumburg's*] affirmation that government does indeed have the right to regulate charitable solicitation. The point is that it must use 'precise' tools consistent with First Amendment rights in doing so." *Id.* at 6.

II. NO REGULATORY SCHEME PROMULGATED UNDER THE MARYLAND LAW, PROVIDING FOR EXCEPTIONS TO THE 25 PERCENT RULE, COULD PROVIDE OBJECTIVE STANDARDS FOR WAIVER OF THE RULE.

The exercise of first amendment rights cannot be subject to official discretion. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 616-17 (1976); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 97-98 (1972); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); *Schneider v. Irvington*, 308 U.S. 147, 164 (1939). The mere existence of this discretion without its abuse amounts to an unconstitutional restraint on protected activity. *Thornhill v. Alabama*, 310 U.S. 88 (1940). Regulation of charitable solicitation should leave "little or no discretion in the hands of [local] authorities to 'censor' unpopular speech." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 645 (1980) (Rehnquist, J., dissenting). Petitioner's emphasis on the "extremely liberal manner," Petitioner's Brief at 3, in which the Secretary of State has applied the waiver provision does not give the *amici* assurance that the next Secretary of State will be as liberal, and indeed points up the subjective nature of the Secretary's decision. The *amici* do not relish the prospect of funding even their most ambitious programs at the pleasure of a government official.

Excess costs of fund raising, over the 25 percent limitation in the Maryland statute, can arise in several ways:

—as a result of fraud or self-dealing;

—as a result of inefficiency;

—as a result of unexpected external developments beyond the organization's control;

—as a result of the stubborn pursuit of unpopular or unattractive but nevertheless legitimately charitable objectives.

Fraud and self-dealing are violations of our criminal statutes. As the *Schaumburg* opinion points out: "Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." 444 U.S. at 637 (citations omitted). To punish such conduct in the guise of regulating solicitation costs raises questions of due process, quite apart from first amendment issues.

To penalize fund raising costs as excessive on efficiency grounds requires judgments about what is indeed the more efficient or effective means of conducting the activities of the organization, on which it often depends for its continued existence. Since "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," *id.* at 632, the issue of efficiency cannot usually be separated from subjective decisions about the organization's charitable and educational objectives. It is clearly less expensive to use volunteers than to use professionals for door-to-door soliciting. But if the organization wishes to give the volunteers an evening or two of training before they go out on the street, it may not be able to find enough volunteer hours to cover the community, and may have to fill in with professionals. Is this a justified expense? Or the organization may think it worthwhile to use broadcast television spot announcements in advance of a door-to-door campaign, or to experiment with "narrowcast" cable television messages.[4] Is that expense justified?

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[4] The statute excludes the cost of printing and mailing, but does not mention the cost of electronic media or newspaper advertising. Activities that are primarily educational in nature, including publishing, may be held within the 25% limit. The statute defines "solicit" as including "[t]he distribution, circulation, posting, or publishing of any handbill, written advertisement, or other publication which, directly or by implication, seeks contributions by the public for one or more charitable purposes." MD. ANN. CODE art. 41, § 103A(i)(3) (Supp. 1982). The implementing regulations provide, "The expenses of public education materials and activities,

As the United States Court of Appeals for the Fifth Circuit pointed out in *Fernandes v. Limmer*, 663 F.2d 619, 631 (5th Cir. 1981) (emphasis supplied), paraphrasing *Schaumburg*: "The realm of religious and *charitable* organizations . . . includes groups whose unorthodox messages will inevitably yield less cost-effective solicitation results. May [the local authorities] premise the simultaneous admission of, for example, evangelical Baptists and the exclusion of Krishna devotees on the results of their fund solicitation efforts?"

It might be argued that the Maryland statute leaves no room for administrative discretion in granting the waiver, because it permits an administrative waiver only "in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions," Md. Ann. Code art. 41, § 103D(a) (1978), and must therefore be read to bar any excess-cost fund raising technique, so long as the organization can remain solvent (or so long as it can raise any money at all) with the aid of fund raising methods that take 25 percent or less of its proceeds. This reading of the statutory language would call for a narrower exercise of administrative discretion. But it would also prevent organizations from pursuing just the kind of additional, and probably less cost-efficient, fund raising methods that they need to keep abreast of their rapidly growing responsibilities. *See* L. Salamon & A. Abramson, *supra* p. 2.

The statutory language might, however, be read more broadly in the light of the regulations issued under it, which provide, "The Secretary may permit an organization to exceed the 25-percent limitation . . . upon a showing that it is necessary to the accomplishment of the organization's charitable purpose and that there is no other reasonable alternative." Md. Admin. Code § 01.02.04.05B(1) (Supp. I 1978).

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which include an appeal, specific or implied, for financial support, shall be fully allocated to fund-raising expenses." MD. ADMIN. CODE § 01.02.04.04A(3) (Supp. I 1978).

The language of the regulation, "necessary to the accomplishment of the organization's charitable purpose," seems to go beyond the literal meaning of the statutory language to give the organization somewhat more latitude in its fund raising practices.

But the only guidance that the regulations offer in interpreting the broad language of their initial provision, is a further provision that

> Instances in which the 25-percent limitation would effectively prevent an organization from raising contributions, *include, but are not limited to,* the following situations:
>
> (a) When there are extraordinary, unusual and non-recurring circumstances which can be factually supported; and
>
> (b) When an organization is less than 2 fiscal years old and in the developmental stage.

Id. § 01.02.04.05B(2) (emphasis supplied).

If these regulations are construed to mean that the Secretary of State may decide whether the organization's budgetary goals are justified, as argued in the brief *amicus curiae* of the Massachusetts Attorney General, discussed above, his decision would seem an extraordinarily intrusive interference with the conduct of the organization's business. If the regulations are construed to mean that the charity remains free to fix its budgetary goals, but that it has the burden of proving that excess-cost fund raising methods are the only means available, even this interpretation seems to invite a judgment by the Secretary on mixed questions of charitable management and charitable policy that ought to remain within the purview of the private sector. The Secretary of State could not determine the applicability or nonapplicability of the exception on the issue of efficiency without the possibility of intolerable and unconstitutional interference in the internal affairs of the organization.

Apart from the issues of fraud or inefficiency, excess fund raising costs can arise from unpredictable and uncontrollable external developments, more likely in the denominator (the volume of contributions) than in the numerator (the cost of fund raising). "The costs incurred by charitable organizations conducting fundraising campaigns can vary dramatically depending on a wide range of variables, many of which are beyond the control of the organization." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 n.10 (1980). In such a situation, the organization may be exposed to criminal prosecution if it did not anticipate the shortfall in contributions and request a waiver in advance, and if the Secretary disagrees with its judgment about the necessity of the fund raising method employed.

Finally, if the excess fund raising costs are the result of an organizational decision to pursue its cause at all costs, then there is no way that an administrative tribunal can make a judgment that those costs are excessive, without making a judgment as to the worth of the cause. This Court has steadfastly refused to permit a bona fide charitable organization to be subjected to such administrative interference. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620-22 (1976); *Largent v. Texas*, 318 U.S. 418, 422 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940); *Schneider v. Irvington*, 308 U.S. 147, 163-64 (1939); *Lovell v. Griffin*, 303 U.S. 444, 451-52 (1938); *see also Schaumburg*, 444 U.S. at 640, 643 n.1 (Rehnquist, J., dissenting).

In the simplest case, an organization may believe that the importance of the cause it supports is so great that it is justified in seeking public support for an extended or indefinite period of time, although there are no indications that the public is being persuaded. Again, the exceptions in the Maryland statute for new organizations or nonrecurring circumstances would not deal with this case. Or an organization may feel that the problem it is attempting to deal with is so urgent that it is justified in

seeking immediate widespread support even though the percentage of costs will be very high. Or an organization may believe it is particularly important that the cause it supports be brought to the attention of the most intransigent segment of the population, although the financial return will be very small. Or an established organization may take up a new cause, as the March of Dimes did with birth defects. *See National Foundation v. City of Fort Worth*, 415 F.2d 41, 43 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970). All these examples illustrate the view of the *Schaumburg* court that "solicitation is characteristically intertwined with informative and perhaps persuasive speech," 444 U.S. at 632, and that administrative discretion to permit or deny excess fund raising costs inevitably involves judgment about how much effort should be spent on the propagation of an idea, whether it relates to the welfare of policemen or to the protection of the environment.

CONCLUSION

For all these reasons, the judgment of the Maryland Court of Appeals should be affirmed.

Respectfully submitted,

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April 1983

APPENDIX

State Laws Limiting
Noncharitable Use of Charitable Contributions

State	Citation	Applicable To—	Cost Limitation	Provision for Exercise of Discretion
Alabama	No statute regulating charitable solicitations, but there are provisions penalizing theft by deception. ALA. CODE §§ 13A-8-1(1), -2 (1982).			
Alaska	No statute regulating charitable solicitations, but it is a criminal offense to use false pretenses in soliciting. ALASKA STAT. § 11.20.450 (1970).			
Arizona	No statute regulating charitable solicitations, but there are provisions for theft by misrepresentation and for theft by impersonation of a representative of a person or organization. ARIZ. REV. STAT. ANN. §§ 13-1802, -2006 (1978).			
Arkansas	ARK. STAT. ANN. § 64-1610 (1980).	Compensation to professional fund raisers for services rendered paid out of all funds collected	Maximum compensation of 25% of contributions received and not less than 75% of funds so collected shall be expended for the purposes and/or causes for which such funds were solicited	No
	Also, criminal penalty for persons who obtain money or property by false pretense or misrepresentation. ARK. STAT. ANN. § 64-1612 (1980).			
California	Statute regulating paid fund raisers and requiring disclosure of % of total used for fund raising expenses, but no % limita. CAL. BUS. & PROF. CODE § 17510.3(a)(3) (West Supp. 1981).			
	Also, criminal penalty for persons who make false representations of fact in solicitation of money or property. CAL. PENAL CODE § 532d (West 1970).			

State	Citation	Applicable To—	Cost Limitation	Provision for Exercise of Discretion
Colorado	No statute regulating charitable solicitations, but it is a criminal offense to cause a person from whom funds are solicited to believe that those contributions will be used primarily for the benefit of a charitable organization when such use is not intended by the solicitor. COLO. REV. STAT. § 18-5-115 (1978).			
Connecticut	CONN. GEN. STAT. ANN. § 19-323o (West 1977).	Professional solicitors only, not including cost of goods or services provided	a) Where actual cost to charitable organization of goods sold or services is less than $500—maximum compensation of 25% including reimbursement for expenses b) Where actual cost is greater than $500— (i) maximum compensation of 50% up to and including $10,000 (ii) maximum compensation of 40% of contributions greater than $10,000 but less than $20,000 (iii) maximum compensation of 35% of contributions greater than $20,000	No
	Also, criminal penalty for persons who pretend to represent an organization with the intent to defraud another. CONN. GEN. STAT. ANN. § 53a-130 (West 1972).			

Delaware	No statute regulating charitable solicitations, but there is criminal penalty for theft by false representation of a past or present fact. DEL. CODE ANN. tit. 11, § 843 (1974).			
District of Columbia	Statute regulating persons who solicit for donations and requiring disclosure of expenses and actual or intended distributions of contributions collected, but no % limits. D.C. CODE ANN. § 2-706 (1981). Also, criminal penalty for persons who obtain anything of value by false pretenses with intent to defraud. D.C. CODE ANN. § 22-1301 (1981).			
Florida	FLA. STAT. ANN. § 496.11(8) (West Supp. 1982) (repealed effective Oct. 1, 1984).	Payable to a professional solicitor, including all costs	Maximum compensation of 25%	No
	Also, criminal penalty for persons who misrepresent what, if any, organization for which they solicit or misrepresent persons who endorse the cause for which they solicit. FLA. STAT. ANN. § 496.11 (West 1972) (repealed effective Oct. 1, 1984).			
Georgia	GA. CODE ANN. § 43-17-7 (1982).	Total contributions, not including: goods sold, food, drink, postage, printing, and related costs	At least 70% for charitable purposes for which contributions were solicited and received	Yes,* for one year; renewable for one year or without limitation
	Also, provision for criminal penalty for persons who make false statements regarding the purpose of solicitations by telephone. GA. CODE ANN. § 16-9-54 (1982).			
	Also, criminal penalty for organizations and professional solicitors for use of the name of another person for the purpose of solicitation, without his consent. GA. CODE ANN. § 43-17-9 (1982).			

* Counties, municipalities or consolidated governments may add requirements and rules but may not alter obligations. GA. CODE ANN. § 43-17-17 (1982).

State	Citation	Applicable To—	Cost Limitation	Provision for Exercise of Discretion
Hawaii	HAWAII REV. STAT. § 467B-7 (1976 & Supp. 1981).	Payments to professional fund raisers, not including cost of goods and services	Maximum compensation of 20%	No
	Also, criminal penalty for persons who misrepresent or mislead anyone as to the charitable nature of their solicitations and for organizations and solicitors who use a device in solicitation which would tend to confuse the public. HAWAII REV. STAT. § 467B-9 (1976 & Supp. 1981).			
Idaho	Statute regulating nonprofit corporations and charities by means of Attorney General supervision, but no % limits, IDAHO CODE § 67-1401(4) (Supp. 1982).			
	Also, criminal penalty for persons who obtain control of property of another by deception or conduct heretofore known as obtaining money or property under false pretenses. IDAHO CODE § 18-2403(2) (Supp. 1982).			
Illinois	Act to Regulate Solicitation of Funds, § 9(c), ILL. REV. STAT. ch. 23, § 5109(c) (Smith-Hurd Supp. 1982).	Sending of goods, wares and merchandise not ordered or requested by the recipient, not including costs of merchandise and services	Maximum of 25% to supplier of goods	No
	Act to Regulate Solicitation of Funds, § 9(c), ILL. REV. STAT. ch. 23, § 5109(c) (Smith-Hurd Supp. 1982).	Gross receipts not including costs of merchandise and services	Minimum of 75% to charitable purpose	No
	Also, criminal penalty for persons committing false personation of a representative of any charitable organization. Criminal Code of 1981, § 17-2(a), ILL. REV. STAT. ch. 38, § 17-2(a) (Smith-Hurd 1977).			

Indiana	No statute regulating charitable solicitations, but criminal penalty for persons committing theft by obtaining unauthorized control over the property of another by creating or confirming false impressions in another person. IND. CODE ANN. § 35-43-4-1 (b) (4) (Burns 1979). Also, there is criminal penalty for persons who misrepresent their own or another's identity with the intent to defraud. IND. CODE ANN. § 35-43-5-3(7) (Burns 1979).			
Iowa	IOWA CODE ANN. § 122.1 (West 1949).	All donations	All donations are to be devoted to the purpose stated in bond application and for which donations were given	Secretary of State has full discretion regarding the issuance of permits to organizations which solicit public donations; he must satisfy himself that applicant is reputable and that the purposes for which donations are solicited are legitimate and worthy
	Also, criminal penalty for persons who divert funds obtained by public donation to purpose other than that for which donations contributed. IOWA CODE ANN. § 122.6 (West 1949).			
Kansas	KAN. STAT. ANN. § 17-1747(c) (1981).	Sending of goods, wares and merchandise not ordered or requested by the recipient; not including costs of merchandise or services	Maximum of 25% to supplier of goods not ordered	No
	KAN. STAT. ANN. § 17-1747(c) (1981).	Gross receipts	Minimum of 75% to charitable purpose	No
	Also, charitable organizations subject to civil penalties for use of any artifice to defraud by means of false pretenses. KAN. STAT. ANN. § 17-1747(c) (1981). Also, criminal penalty for persons obtaining control over property by deception. KAN. STAT. ANN. § 21-3701(b) (1981).			

State	Citation	Applicable To—	Cost Limitation	Provision for Exercise of Discretion
Kentucky	Statutes regulating solicitations, but no % limits.* KY. REV. STAT. §§ 367.650-.670 (Supp. 1982). Also, criminal penalty for persons who obtain property by creating or reinforcing a false impression as to state of mind, law, value or intention. KY. REV. STAT. § 514.040 (Supp. 1982).			
Louisiana	No statute regulating charitable solicitation, but it is a criminal offense to misappropriate a thing of value by means of fraudulent conduct, practices or misrepresentations. LA. REV. STAT. ANN. § 14:67 (West 1974).			
Maine	Statute regulating fund raisers and any other person, requiring disclosure of % distribution if less than 70% expended for program services but, no % limits; professional fund raisers must disclose to donor % that is fee and expenses. ME. REV. STAT. ANN. tit. 9, § 5012 (1980). Also, criminal penalty for persons who obtain control over property by deception. ME. REV. STAT. ANN. tit. 17A, § 354 (Supp. 1980).			
Maryland	MD. ANN. CODE art. 41, § 103D (1978).	Any fund raising activity, not including compensation for feasibility studies, cost of goods, food, entertainment, drink, postage	Maximum of 25%	Yes; where the 25% limitation would effectively prevent the charitable organization from raising contributions
	Also, criminal penalty for persons who obtain control over property of owner by means of deception. MD. ANN. CODE art. 27, § 342 (1982).			

* Op. Ky. Att'y Gen. 76-605 evaluates a city ordinance that limits the % of solicited funds that can go to costs, but the opinion determines only that the ordinance and the statute are not in conflict.

Massachusetts	MASS. ANN. LAWS ch. 68, § 21(a) (Michie/Law. Co-op. 1978 & Supp. 1983).	Professional solicitors (only), not including cost of goods and services	Maximum compensation of 15%	No
	MASS. ANN. LAWS ch. 68, § 22 (Michie/Law. Co-op. 1978 & Supp. 1983).	Any fund raising activity of charitable organization, not including cost of goods and services	Maximum of 50% of gross income devoted to salaries, wages, and expenses related to soliciting or receiving contributions	Yes; "where it would be in the public interest" to allow the solicitation
	Also, civil penalty for charitable organization for use of any artifice to defraud by means of false pretenses. MASS. ANN. LAWS ch. 68, § 30(e) (Michie/Law. Co-op. 1978).			
	Also, criminal penalty for persons who obtain property of another by false pretenses with the intent to defraud. MASS. ANN. LAWS ch. 226, § 30 (Michie/Law. Co-op. 1980).			
Michigan	Statute regulating charitable organizations and professional fund raisers, but no % limits. MICH. COMP. LAWS ANN. §§ 400.271-.293 (1976 & Supp. 1982).			
	Also, criminal penalty for persons who obtain money or property from another person with the intent to defraud or cheat. MICH. COMP. LAWS ANN. § 750.218 (1968).			
Minnesota	MINN. STAT. ANN. § 309.555, subd. 1a (West Supp. 1981).	Management or general costs and fund raising costs of charitable organization	"Unreasonable amount" —an amount in excess of 30% of total income and revenue is presumed to be an unreasonable amount; an amount of 30% or less may be challenged as unreasonable	Yes, only a presumption

State	Citation	Applicable To—	Cost Limitation	Provision for Exercise of Discretion
Minnesota—continued	MINN. STAT. ANN. § 309.555, subd. 1b (West 1969).	Professional fund raisers only	"Unreasonable amount"—an amount in excess of 30%; an amount less than 30% may also be challenged	No; 30% is an absolute maximum, although this may be adjusted downward.
	MINN. STAT. ANN. § 309.555, subd. 2 (West 1969).	Management, general costs and fund raising costs involved in the provision of goods and services	"Unreasonable amount" is presumed to be an amount in excess of 30% of the difference between the cost and amount for which sold	Yes, only a presumption
	Also, criminal penalty for charitable organizations and persons acting on their behalf for use of fraud, false pretense, or misrepresentation in connection with charitable solicitation. MINN. STAT. ANN. § 309.581 (West 1969).			
	Also, criminal penalty for persons who obtain property of another by swindling, artifice or trick. MINN. STAT. ANN. § 609.52 (West 1964).			
Mississippi	No statute regulating charitable solicitations, but criminal penalty for persons who falsely impersonate another and who receive money or property intended to be delivered to the individual impersonated. MISS. CODE ANN. § 97-19-35 (1973).			
	Also, criminal penalty for person who obtains money or personal property from another by false pretense with the intent to defraud. MISS. CODE ANN. § 97-19-39 (1973).			
Missouri	No statute regulating charitable solicitations, but criminal penalty for persons who steal by means of deceit. MO. ANN. STAT. § 570.030 (Vernon 1979).			
Montana	No statute regulating charitable solicitation, but criminal penalty for persons who obtain control over the property of another by deception. MONT. CODE ANN. § 94-6-302 (Supp. 1977).			

Nebraska	Statute regulating voluntary health and welfare organizations but no % limits. NEB. REV. STAT. § 28-1401 (1979).			
	Also, criminal penalty for persons who obtain property of another by deception. NEB. REV. STAT. § 28-512 (1979).			
Nevada	Statute regulating charitable organizations, but no % limits. NEV. REV. STAT. § 86.190 (1979).			
	Also, criminal penalty for persons who obtain money or other valuable thing from another by false pretenses with the intent to defraud. NEV. REV. STAT. § 205.380 (1979).			
New Hampshire	N.H. REV. STAT. ANN. § 320:20 (1966)	Total funds collected by any person, group or organization	Minimum of 85% to be remitted to the purpose for which solicitation is conducted	No *
	Also, criminal penalty for persons who obtain property of another by deception. N.H. REV. STAT. ANN. § 637:4 (1966).			
New Jersey	N.J. STAT. ANN. § 45:17A-10(a) (West 1978).	Payments to a professional fund raiser and professional solicitor, including reimbursement, not including cost of goods and services provided	Maximum compensation of 15%	No
	N.J. STAT. ANN. § 45:17A-14(a)(5) (West 1978).	Total funds raised by solicitations mailed together with unordered merchandise by a charitable organization, professional fund raiser, or other person	Minimum of 50% must be devoted to charitable purposes	No
	Also, criminal penalty for persons who obtain property of another by deception. N.J. STAT. ANN. § 2C:20-4 (1982).			

* Sections 320:21 and 31:91 grant limited discretion to local governments for sale of flowers and tags.

State	Citation	Applicable To—	Cost Limitation	Provision for Exercise of Discretion
New Mexico	No statute regulating charitable solicitations, but criminal penalty for persons who misappropriate the property of another by means of fraudulent conduct, practices or representations. N.M. STAT. ANN. § 30-16-6 (1978).			
New York	N.Y. EXEC. LAW § 175(2)(e) (McKinney Supp. 1981).	Total funds raised by solicitations mailed together with unordered merchandise by a charitable organization or other person	Minimum of 50% must be devoted to charitable purposes	No
	Also, criminal penalty for persons who wrongfully obtain the property of another by conduct formerly known as obtaining property by false pretenses, which requires proof of the falsity of the representation of a past or existing fact, the intent to defraud, reliance on the false pretenses and obtaining the property by the accused. N.Y. PENAL LAW § 155.05 (McKinney 1975).			
North Carolina	Statute regulating professional solicitors and any licensed solicitor or organization or person soliciting on behalf of them, but no % limits. N.C. GEN. STAT. § 131C-14(b) (Supp. 1981). They must report amount pledged, received, and disbursed, and disclose percentage of fund raising expenses and purpose of the organization. The Social Services Commission to adopt rules as to form of disclosure. N.C. GEN. STAT. § 131C-16 (Supp. 1981).			
	Also, criminal penalty for persons who obtain money or property from another by false pretenses with intent to cheat or defraud. N.C. GEN. STAT. § 14-100 (1981).			
North Dakota	N.D. CENT. CODE § 50-22-04.1 (1982).	Payments to professional solicitor, not including costs of goods and services	Maximum compensation of 15%	No

	N.D. CENT. CODE § 50-22-04.1 (1982).	An organization's solicitation and fund raising expenses (including payments to professional solicitors), not including costs of goods and services	Maximum of 35%	Yes; in the event special facts or circumstances are presented requiring expenses higher than 35%, the Secretary of State has discretion to allow such higher expense and impose such conditions as he shall deem necessary for such redemption
	Also, criminal penalty for persons who obtain property of another by deception. N.D. CENT. CODE § 12.1-23-02 (1982).			
Ohio	Statute regulating charitable solicitations by professional fund raisers and reports by professional fund raisers, but no % limits.* OHIO REV. CODE ANN. § 1716.04 (Page 1978).			
	Also, criminal penalty for persons who deprive another of property or services by deception. OHIO REV. CODE ANN. § 2913.02 (Page 1975).			
Oklahoma	OKLA. STAT. ANN. tit. 18, § 552.3(B) (West Supp. 1982).	Charitable organization, professional fund raiser or professional solicitor; but, in annual report, an organization is to separate expenses from payments to fund raiser or solicitor	Maximum compensation to professional fund raiser or solicitor of 10% of net receipts, and the charitable organization must receive minimum of 90% of said receipts; an organization must have full control of funds collected	No

* No discretion granted by state statute; however, city ordinance that provided for 25% limit on payment to a non-affiliated solicitor as a rebuttable presumption of unreasonableness was upheld as not violating the charity's right of free speech. Holloway v. Brown, 62 Ohio St. 2d 65, 403 N.E.2d 191 (1980).

State	Citation	Applicable To—	Cost Limitation	Provision for Exercise of Discretion
Oklahoma—continued	Also, criminal penalty for persons who obtain money or property of another by means of trick, deception or false pretenses, with the intent to defraud. OKLA. STAT. ANN. tit. 21, §§ 1541.1-.2 (West Supp. 1982).			
Oregon	OR. REV. STAT. § 128.855 (1981).	Costs of solicitation and other administrative costs; not including cost of merchandise or goods or direct costs of sponsoring a fund raising dinner, bazaar, show, circus, or any form of benefit performance	Costs may not be "grossly disproportionate to the proportion of donations . . . used for charitable purposes"; costs of solicitation exceeding 25% of net proceeds, or combined costs of solicitation and administrative costs exceeding 50% of net proceeds shall be "rebuttably presumed to be grossly disproportionate"	Yes, only a rebuttable presumption.
	Also, criminal penalty for persons who make false or misleading representations in the course of any solicitation of charitable donations. OR. REV. STAT. § 128.813 (1981).			
	Also, criminal penalty for persons who obtain property of another by deception, with intent to defraud. OR. REV. STAT. § 164.085 (1981).			
Pennsylvania	PA. STAT. ANN. tit. 10, § 160-6(a) (Purdon Supp. 1982).	Payments to professional solicitor	Maximum compensation of 15%	No

	PA. STAT. ANN. tit. 10, § 160-6(a.1) (Purdon Supp. 1982).	Cost of solicitation and fund raising expenses (including payments to professional solicitors and internal fund raising and solicitation salaries and expenses, but not including cost of goods and services)	Maximum expense of 35%	Yes; with discretion vested in the Commission on Charitable Organizations (similar to North Dakota provision)
	Also, criminal penalty for persons who obtain the property of another by deception. PA. STAT. ANN. tit. 18, § 3922 (Purdon 1973).			
Rhode Island	R.I. GEN. LAWS § 5-53-4(a) (Supp. 1982).	Payment to professional solicitor, not including cost of goods and services provided	Maximum compensation of 25%	No
	R.I. GEN. LAWS § 5-53-4(a.1) (Supp. 1982).	Cost of solicitation and fund raising expenses incurred by a charitable organization (including payments to professional solicitors, but not including cost of goods and services)	Maximum of 50%	Yes; with discretion vested in the department of business regulations (similar to North Dakota provision)
	Also, criminal penalty for persons who obtain money or property of another by false pretenses with the intent to cheat or defraud. R.I. GEN. LAWS § 11-41-4 (1981).			
South Carolina	S.C. CODE ANN. § 33-55-80 (Law. Co-op. 1977).	Payment to professional solicitor; not including cost of goods and services	Maximum compensation of a "reasonable percent" of total funds collected	Yes; since there is no definition of "reasonable"

State	Citation	Applicable To—	Cost Limitation	Provision for Exercise of Discretion
South Carolina—continued	Also, possible civil or criminal penalty for persons who misrepresent or mislead in the course of a solicitation of funds. S.C. CODE ANN. § 33-55-140 (Law. Co-op. 1977).			
	Also, criminal penalty for persons who obtain property of another by false pretenses with the intent to cheat and defraud. S.C. CODE ANN. § 16-13-240 (Law. Co-op. Supp. 1982).			
South Dakota	S.D. CODIFIED LAWS ANN. § 37-27-24 (1977).	Payment to professional fund raiser, including cost of any expense incurred pursuant to contract with fund raiser	Maximum compensation of 30%	No
	Also, criminal penalty for persons who obtain property of another by deception. S.D. CODIFIED LAWS ANN. § 22-30A-3 (1979).			
Tennessee	TENN. CODE ANN. § 48-2213 (1979).	Payment to professional solicitor, including all fund raising costs	Maximum compensation of 15%	No
	TENN. CODE ANN. § 48-2213 (1979).	Gross contributions expended for fund raising costs	An amount in excess of 25% spent on fund raising costs shall create a rebuttable presumption that such expenditures are unreasonable; an amount not in excess of 25% shall create a rebuttable presumption of reasonableness	Yes, only a rebuttable presumption

	Also, criminal penalty for persons who mislead another as to the nature and purpose of a solicitation. TENN. CODE ANN. § 48-2213 (1979).			
Texas	Statute regulating nonprofit corporations, but no % limits. TEX. REV. CIV. STAT. ANN. arts. 1396-1.01 to 11.01 (Vernon 1980).			
	Also, criminal penalty for persons who appropriate property of another without the other person's effective consent. TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 1981).			
Utah	Statute regulating charitable organizations and professional solicitors, but no % limits. UTAH CODE ANN. § 76-10-601 (1978).			
	Also, criminal penalty for persons who obtain control over property of another by deception with the intent to deprive the other person of the property. UTAH CODE ANN. § 76-10-405 (1978).			
Vermont	No statute regulating charitable solicitations, but criminal penalty for persons who received money while in the guise of another or who by false pretenses obtain money or property of another with the intent to defraud. VT. STAT. ANN. tit. 13, §§ 2001-2002 (1974).			
Virginia	Statute regulating professional solicitors; disclosure to donor is required of the minimum percentage of amount contributed that will be received by the charitable organization for its own use unless 70% of contribution is used for charitable purpose. VA. CODE § 57-55.1 (1981).			
	Also, criminal penalty for persons who obtain money from another by false pretense with the intent to defraud. VA. CODE § 18.2-178 (1982).			
Washington	WASH. REV. CODE ANN. § 19.09.100 (Supp. 1983).	Cost of solicitation, including payments to professional fund raisers, but not including cost of goods and services resold	Maximum of 20%	Yes; (similar to North Dakota provision)
	Also, criminal penalty for persons who obtain control over the property of another by deception. WASH. REV. CODE ANN. § 9A.56.020 (1977).			
	Also, criminal penalty for persons who assume a false identity as a representative of a person or organization with the intent to defraud. WASH. REV. CODE ANN. § 9A.60.040 (1977).			

State	Citation	Applicable To—	Cost Limitation	Provision for Exercise of Discretion
West Virginia	W. VA. CODE § 29-19-7(a) (1980).	Payments to professional solicitor, not including cost of goods and services provided	Maximum compensation of 15%	No
	Also, criminal penalty for persons who obtain money from another by false pretense with the intent to defraud. W. VA. CODE § 61-3-24 (1977).			
Wisconsin	Statute regulating solicitation of funds for charitable purposes, but no % limits. WIS. STAT. ANN. § 440.41 (West 1974 & Supp. 1982).			
	Also, criminal penalty for persons who obtain title to property by deceiving another with false representations, with intent to defraud. WIS. STAT. ANN. § 943.20 (West 1958 & Supp. 1982).			
Wyoming	No statute regulating charitable solicitations, but criminal penalty for persons who obtain money or property by false pretenses, with the intent to cheat or defraud. WYO. STAT. § 6-3-106 (1977).			

No. 82-766-CSX
Status: GRANTED

Title: Secretary of State of Maryland, Petitioner
v.
Joseph H. Munson Company, Inc.

Docketed:
November 3, 1982

Court: Court of Appeals of Maryland

Counsel for petitioner: Zarnoch, Robert A.

Counsel for respondent: Goldberg, Yale L.

Entry	Date	Note	Proceedings and Orders
1	Nov 3 1982	G	Petition for writ of certiorari filed.
2	Dec 3 1982		Brief of respondent Joseph Munson Co., Inc. in opposition filed.
3	Dec 8 1982		DISTRIBUTED. January 7, 1983
4	Jan 3 1983	X	Reply brief of petitioner Sec. of State of MD filed.
5	Jan 10 1983		Petition GRANTED.
			**********
7	Jan 25 1983		Order extending time to file brief of respondent on the merits until April 25, 1983.
9	Feb 4 1983		Order extending time to file brief of petitioner on the merits until March 16, 1983.
11	Mar 11 1983		Order further extending time to file brief of petitioner on the merits until March 23, 1983.
12	Mar 18 1983		Joint appendix filed.
13	Mar 23 1983		Brief of petitioner Sec. of State of MD filed.
14	Mar 24 1983		Brief amicus curiae of States of Connecticut, et al. filed.
15	Apr 1 1983		Record filed.
16	Apr 22 1983		Brief of respondent Joseph Munson Co., Inc. filed.
17	Apr 22 1983		Brief amicus curiae of ACLU, et al. filed.
18	Apr 22 1983		Brief amicus curiae of Natl. Health Council, et al. filed.
19	Apr 27 1983		Brief amicus curiae of Box Office, Inc. filed.
20	Jul 8 1983		CIRCULATED.
21	Sep 21 1983		SET FOR ARGUMENT. Monday, October 31, 1983. (1st case)
22	Oct 5 1983	X	Reply brief of petitioner Sec. of State of MD filed.
23	Oct 31 1983		ARGUED.